No. 01-309-CFX Title: Larry Hope, Petitioner
v.
Mark Pelzer, et al.

Docketed: August 21, 2001 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 28 2001	Petition for writ of certiorari filed. (Response due September 20, 2001)
	Jul 28 2001	Supplemental Appendix of petitioner filed.
	Sep 26 2001	DISTRIBUTED for Conference of October 12, 2001
	Oct 10 2001	Response requested.
	Nov 9 2001	Brief of respondents Mark Pelzer, et al. in opposition filed.
	Nov 20 2001	REDISTRIBUTED for Conference of December 7, 2001
	Dec 28 2001	REDISTRIBUTED for Conference of January 4, 2002
	Jan 4 2002	Petition GRANTED. SET FOR ARGUMENT April 17, 2002. **********
	Jan 29 2002	The order granting the petition for a writ of certiorari is amended as follows: "The petition for a writ of certiorari is granted limited to the following questions: 1. Whether state officials sued in their individual capacities under 42 U.S.C. Section 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights 'clearly established' by a case presenting facts 'materially similar' to those in the plainfiff's case. 2. Whether under the circumstances that must be taken as true at the summary judgment of stage of this case, tying a prisoner to a 'hitching post' violates 'clearly estalished' constitutional rights for purposes of qualified immunity under 42 U.S.C. Section 1983."
	Feb 13 2002	Time to file petitioner's brief extended to and including February 21, 2002. The brief must filed with the Clerk and served upon opposing counsel on Feb. 21, 2002. Rule 29.2 does not apply.
	Feb 19 2002	Joint appendix filed.
	Feb 19 2002	Brief amicus curiae of United States filed.
	Feb 21 2002	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Feb 21 2002	Brief of petitioner Larry Hope filed.
	Mar 20 2002	CIRCULATED.
	Mar 21 2002	Record filed.
	Mar 25 2002	Brief amici curiae of Missouri, et al. filed.
	Mar 25 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 25 2002	Brief of respondents Mark Pelzer, Gene McClaran, and Jim Gates filed.
	Mar 29 2002	Motion of Missouri, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.

2 pp

No. 01-309-CFX

Entry	Date	Proceedings and Orders
	Apr 1 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 8 2002	Reply brief of petitioner Larry Hope filed.
	Apr 12 2002	Motion of Missouri, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
	Apr 17 2002	ARGUED.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether prior case holdings articulating general statements of law are capable of giving sufficient warning to defeat qualified immunity when such a statement of law applies with obvious clarity to the type of conduct in question, even though the very action in question has not previously been held unlawful.

2) Whether state correctional officers are entitled to claim qualified immunity for subjecting inmates to prolonged, punitive restraint under circumstances which are obviously inconsistent with the constitutional principles governing necessity for and duration of restraint articulated by clearly established prior law, even though the precise method of restraint was not addressed by such prior rulings.

3) Whether longstanding Supreme Court decisions recognizing the unconstitutionality of the pillory and similar draconian devices give fair and clear warning that prolonged, punitive restraint upon a device which is the functional equivalent of the pillory is similarly prohibited.

4) Whether there are some cases, such as those involving torture, in which the constitutional right alleged to have been violated is so apparent that clarifying case law is neither available nor necessary in order to overcome a claim of qualified immunity.

PARTIES TO THE PROCEEDING BELOW

The Petitioner in this Court, Larry Hope, is an individual who was the plaintiff in the District Court and the appellant in the Court of Appeals. The Respondents, Mark Pelzer, Gene McClaran, and Jim Gates a/k/a Keith Gates, are all individuals who were the defendants in the District Court and the appellees in the Court of Appeals.

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OPINIONS BELOW

The Court of Appeals opinion that the Petitioner asks this Court to review is *Hope v. Pelzer*, 240 F. 3d 975 (11th Cir. 2001), which is reproduced in the Appendix. The District Court Opinion is *Hope v. Pelzer*, Case No. 96-02968-CV-BU-S (N.D. Ala. 3/24/00)

JURISDICTIONAL BASIS

This Petition asks the Court to review the February 2, 2001, opinion and judgment of the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals reversed in part and denied in part the decision of the District Court, which had dismissed the Petitioner's claims under 42 U.S.C. §1983 because, it held, the Respondents were entitled to qualified immunity. The Court of Appeals denied the Petitioner's petition for rehearing on May 7, 2001. Should the Court grant certiorari, it would have jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIOINS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

42 U.S.C. §1983 (excerpt):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

STATEMENT OF THE CASE

Petitioner is one of several hundred Alabama inmates who have been shackled to a metal post for extended periods without food, water, or bathroom breaks as punishment for violating prison rules. The Court of Appeals held that the use of the "hitching post" by the Alabama Department of Corrections constituted cruel and unusual punishment in violation of the Eighth Amendment. However, the Court of Appeals granted summary judgment to the Respondents on the issue of qualified immunity, ruling that Petitioner is not entitled to seek compensation for the torture inflicted upon him by officers of the State.

On May 11, 1995, while Petitioner Larry Hope was incarcerated at the Limestone Correctional Facility[1], he was working on a chain gang near an interstate highway when another inmate started an argument with him. Mistakenly concluding that the argument was Hope's fault, a

[1] Mr. Hope has since been released from prison.

correctional officer sent Hope back to the Limestone facility and ordered that he be placed on an outdoor restraining device known as the "hitching post" for being "disruptive to the work squad." However, Petitioner had neither refused to work nor incited other inmates not to work.

Upon being returned to Limestone, Petitioner was placed on the hitching post – meaning that his wrists were handcuffed to a horizontal pole that was roughly the same height as his head – in accordance with Respondent McClaran's instructions. Because Mr. Hope was just slightly taller than the hitching post itself, his arms grew tired from being handcuffed so high, and whenever he tried moving them to improve his circulation, the handcuffs would cut into his writs and cause great pain and discomfort. He was forced to stand in this position for more than two (2) hours, after which he was released because a captain determined that the other inmate – not Mr. Hope – was the one who had started the argument.

Petitioner was again placed on the hitching post on June 7, 1995, when a correctional officer picked a fight with Mr. Hope after catching him asleep on the bus en route to a job site. After a brief struggle, Mr. Hope was subdued, handcuffed, placed in leg irons, and transported back to the prison, where he was placed on the hitching post by Respondent Gates. Petitioner was photographed by national news media while he was on the hitching post that day, and photographs of his humiliation were published in the New York Times and Life magazine.

This time, Mr. Hope was left on the post without a shirt for approximately seven (7) hours, the duration of which he spent standing on his feet with his arms raised and restrained in very hot weather. As before, Hope's ordeal on the hitching post was a very painful one, and whenever he tried to shift his weight to relax one of his feet, it would put tremendous pain on his wrist. While he was on the hitching post, Mr. Hope was deprived of water and teased by two officers when he asked for water. On one occasion, they started to bring him water but ended up giving his water to some dogs. He was given some water once or twice during the entire seven hours, but that was not enough, and at one point during the hottest part of the day he was left without water for at least three hours. In addition to being deprived of water, Hope was teased by officers just for being on the hitching post. When Hope was finally released from the hitching post, his wrists were sore and appeared to be bruised. They became swollen and remained that way for at least another day.

On neither of these two occasions is there any evidence that Mr. Hope continued to pose an imminent threat of violence or disturbance after being transported from the road crew – where the incidents occurred – back to the prison, where he was placed on the hitching post. Likewise, there is no evidence suggesting that Mr. Hope was such a continuing threat to human safety or institutional security to justify being kept in a position of prolonged restraint to a fixed object for hours after any perceived threat had diminished. (App. 1-3, 6)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS DIRECTLY WITH THIS COURT'S DECISION IN *LANIER V. UNITED STATES*.

The Court of Appeals held that "while we recognize that the inappropriateness of the hitching post could be inferred from [prior case law], a bright-line rule for qualified immunity purposes 'is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances.' " (App. 12) The court granted the Respondents qualified immunity because, "though analogous, the facts in [the prior case law] are not 'materially similar' to Hope's situation." (App. 13)

In requiring that the facts of the case be "materially similar" to those in the prior case law, the Eleventh Circuit is attempting to sidestep this court's mandate in *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997), which rejected the Sixth Circuit's requirement that there be a "fundamentally similar" precedent before the law is "clearly established" enough to defeat qualified immunity." In *Lanier*, this Court held that . . . [G]eneral statements of the law are not inherently incapable of giving fair and clear warning [to the Defendants], and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specified conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " 117 S. Ct. at 1226-27, quoting from *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

The *Lanier* decision makes it clear that some of the Courts of Appeals have taken an overly expansive view of qualified immunity, and the case at bar illustrates the extent to which this remains a problem. There is confusion among the circuits in how to interpret *Lanier* and its impact upon qualified immunity analysis with regard to the determination of clearly established law. *Compare Tellier v. Fields*, 230 F. 3d 502, 516 (2d Cir. 2000) (qualified immunity not applicable where prior case decisions "clearly foreshadowed" a decision forbidding defendant's conduct); *Kelly v. City of Oakland*, 198 F. 3d 779, 785 (9th Cir. 1999) ("where unlawfulness is apparent, qualified immunity does not exist"); and *Santemorena v. Georgia Military College*, 147 F. 3d 1337 (11th Cir. 1998) (general principles of law under *Lanier* only apply in "exceptional cases [which] rarely arise"). The case at bar provides an opportunity to clarify the law against the stark backdrop of an unequivocal fact pattern.

A. GENERAL STATEMENTS OF THE LAW ARE CAPABLE OF GIVING FAIR AND CLEAR WARNING WHERE THEY APPLY WITH OBVIOUS CLARITY TO THE CONDUCT IN QUESTION

In the court below, Petitioner relied upon three (3) Eleventh Circuit precedents which clearly establish the unconstitutionality of restraining an inmate to a fixed object and depriving him of water and bathroom breaks for prolonged periods under circumstances where the inmate does to pose a present and immediate threat. *Gates*

v. Collier, 501 F. 2d 1291, 1306 (5th Cir. 1974)[2], *Ort v. White*, 813 F. 2d 318, 327 (11th Cir. 1987), nor *Williams v. Burton*, 943 F. 2d 1572 (11th Cir. 1991). The Court of Appeals accepted the holdings of those prior cases as authority for the proposition that Petitioner was unconstitutionally placed on the hitching post, but the court rejected Petitioner's argument that the law was clearly established in light of the principles articulated by those cases.

It is not necessary that there be a "fundamentally similar" precedent before the law is "clearly established" enough to defeat qualified immunity. *United States v. Lanier*, 117 S. Ct. 119, 1226-27 (1997). In other words, there do not have to be any prior cases involving a "hitching post" in order to defeat qualified immunity where there is already "clearly established law" articulating general principles which are sufficient to put the Defendants on notice of the rights violated by their conduct. " . . . [G]eneral statements of the law are not inherently incapable of giving fair and clear warning [to officials], and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specified conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " 117 S. Ct. at 1226-27, quoting from *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) Certainly the longstanding decisions of the Fifth and Eleventh Circuits cited by Petitioner were sufficient to satisfy this standard.

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[2] Decisions of the Fifth Circuit entered prior to October 1, 1981 are binding upon the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981).

Since it is the fact of unnecessary punitive restraint – rather than the precise manner of restraint – which offends constitutional principles, it does not matter that neither *Gates v. Collier*, *Ort v. White*, nor *Williams v. Burton*, *supra*, deals specifically with a device called a "hitching post". After all, *Gates* does not outlaw fences; rather, it outlaws the act of chaining inmates to fences. 501 F. 2d at 1306. Since *Gates* forbids the "hitching", it is not necessary to explicitly forbid the "post". Likewise, the rule which emerges from *Ort* and *Williams* forbids prison officials from employing any "force or other coercive measures after the necessity for such coercive action has ceased," regardless of the specific manner in which such "force or other coercive measures" is employed. 813 F. 2d at 327; *compare* 943 F. 2d at 1576. The principles elucidated by these three binding precedents were sufficiently understandable in 1995 to warn prison officials and their lawyers that it is unconstitutional to shackle an inmate outdoors for hours without food, water, or toilet breaks when there is no penological necessity for doing so.

B. PROLONGED PUNTIVE RESTRAINT IS CLEARLY INCONSISTENT WITH PRIOR DECISIONS IMPOSING LIMITS UPON THE USE AND DURATION OF RESTRAINTS

In *Gates v. Collier*, the old Fifth Circuit squarely held that the Constitution forbids "handcuffing inmates . . . for long periods of time . . . and forcing inmates to stand . . . or otherwise maintain awkward positions for prolonged periods . . . " 501 F. 2d at 1306; *see also Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) (en banc)

(adopting as binding precedent all decisions of the Fifth Circuit prior to 10/1/81).

If that were not enough, Alabama prison officials were also put on notice by the principles applicable to the restraint of inmates which were articulated by the Eleventh Circuit in the cases of *Ort v. White*, 813 F. 2d 318, 327 (11th Cir. 1987)[3] and *Williams v. Burton*, 943 F. 2d 1572, 1576 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3002, 120 L. Ed. 2d 877 (1992)[4]. While *Ort v. White* approved conduct by prison officials falling far short of the abuse inflicted upon the Plaintiff in this case, that decision nonetheless contained the following statement of clearly established constitutional law:

> "Clearly appellant would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison officials had summarily denied him water or imposed any other form of punishment without first affording him some type of disciplinary hearing. A Fourteenth Amendment violation occurs in this context where prison officers continue to employ force

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[3] *Ort v. White, supra*, states that an inmate "would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison officials had summarily denied him water or . . . continue[d] to employ force or other coercive measures after the necessity for such coercive action ha[d] ceased." 813 F. 2d at 327.

[4] *Williams v. Burton, supra*, sets forth the rule that even if "restraints are initially justified, . . . the basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Fourteenth and Eighth Amendments. . . . " 943 F. 2d at 1576.

> or other coercive measures after the necessity for such coercive action has ceased."

813 F. 2d at 327. In the case at bar, the Plaintiff has alleged that the Defendants did precisely what the Eleventh Circuit had already said they were not allowed to do.

Similarly, the *Williams* case set forth the following principle of clearly established law:

> "Once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation."

953 F. 2d at 1576, citing *Ort v. White*, 813 F. 2d 318, 324 (11th Cir. 1987) and *Smith v. Dooley*, 591 F. Supp. 1157, 1168 (W.D. La. 1984), *aff'd*, 778 F. 2d 788 (5th Cir. 1985).

C. THE CASE LAW RECOGNIZING THE UNCONSTITUTIONALITY OF THE PILLORY APPLIES WITH EQUAL CLARITY TO THE HITCHING POST

Black's Law Dictionary defines "pillory" as "a frame erected on a pillar, and made with holes . . . through which the heads and hands of criminals were put." The only difference between the pillory of times past and the

hitching post of today is that modern technology has substituted metal shackles for the "holes" that were constructed of movable boards before fabricated steel was readily available. One must go back a hundred years to find discussions of the "pillory" in American jurisprudence.

This Court has acknowledged that the pillory was banned by the Eighth Amendment. *Weems v. United States*, 217 U.S. 349, 376 (1910); *see also Ex Parte Wilson*, 114 U.S. 417, 428 (1884). Other courts have reached the same conclusion. *Jackson v. United States*, 102 F. 473, 488 (9th Cir. 1900); *Mickle v. Henricks*, 262 F. 687, 689-90 (D. Nev. 1918); *Davis v. Berry*, 216 F. 413, 417 (S.D. Iowa 1914); *United States v. Wong Dep Ken*, 57 F. 206, 210 (S.D. Cal. 1893); *State v. Evans*, 245 P. 2d 788, 792 (Idaho 1952); *State v. Dietz*, 119 N.W. 2d 833, 836 (Minn. 1963); *Delnegro v. State*, 81 A. 2d 241, 246 (Md. 1951); *Hobbs v. State*, 32 N.E. 1019, 1021 (Ind. 1893); *In re Opinion of the Justices*, 338 A. 2d 802, 806 (Me. 1975) (per curiam); *State v. Cannon*, 190 A. 2d 514, 517 (Del. 1963); *State v. Feilen*, 126 P. 75, 78 (Wash. 1912); *see also United States v. Trani*, 3 C.M.R. 27, 30 (C.M.A. 1952) ("court martials will not impose any punishment not sanctioned by the custom of the service such as carrying a loaded knapsack, wearing irons, shaving the head, placarding, pillory, stocks, and tying up the thumbs.").

In a 1900 case, the Ninth Circuit declined to rule that a particular punishment violated the Eighth Amendment, although it conceded that "it is true there may be exceptional cases, in relation to the whipping post, pillory, or other extreme, isolated, and exceptional cases where the courts have interfered, and held the sentence to be in

violation of the provisions of the [Constitution]." *Jackson v. United States*, 102 F. 2d 473, 488 (9th Cir. 1900), citing Cooley, Constitutional Limitations (6th ed.) at 402 (emphasis added). Such a case was *Hobbs v. State*, 32 N.E. 1019 (Ind. 1893), in which the Supreme Court of Indiana held that the "cruel and unusual punishment" clause applied to punishments "such as that inflicted at the whipping post, in the pillory, . . . etc." 32 N.E. at 1021.

The *Hobbs* decision is significant for qualified immunity purposes in that it was cited with approval by this Court in the celebrated case of *Weems v. United States*, 217 U.S. 349, 376 (1909). In *Weems*, this Court declared that the pillory had already long been abolished – not by judicial fiat but by public opinion – long before the Eighth Amendment was ever held to be applicable to the states by virtue of the Fourteenth Amendment. ". . . [I]t may be well doubted if the rights exist[s] to establish the whipping post and the pillory in those States where they were never recognized as instruments of punishment, or in the States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments." 217 U.S. at 378. Yet *Weems* was not the first time this Court pronounced the unconstitutionality of the pillory. As early as 1879, in the first case in which the Supreme Court labored over the meaning of the Eighth Amendment, the Court noted that "it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that [A]mendment." *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879), cited in *Gregg v. Georgia*, 428 U.S. 153, 170 (1976). The "Commentator referred to" was Gladstone, who had

published a list of all forms of torture which were acceptable punishments in his day. Included on that list was the pillory, which is what Alabama correctional officers now call the "hitching post". *Id.*

The very origin of the phrase "cruel and unusual punishment" has been traced to the 17th-century perjury trial of an English clergyman named Titus Oates, who was convicted and sentenced to the following: life imprisonment, a fine, whippings, defrocking, and being placed on the pillory four (4) times a year. Oates petitioned both the House of Lords and the House of Commons for relief from his sentence. A majority of the House of Commons – joined by a minority of the House of Lords – adopted a resolution concluding that these punishments, including the pillory, were "barbarous, inhumane, unchristian, and unauthorized by law." *Furman v. Georgia*, 408 U.S. 238, 318, 92 S. Ct. 2726, 33 L. Ed. 2d 346, 395, n. 13 (Marshall concurrence), citing Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 Calif. L. Rev. 839, 842 (1969). After the Oates trial, the phrase "cruel and unusual punishments" made its way into the 1689 English Bill of Rights. 428 U.S. at 170, citing 57 Calif. L. Rev. at 842. "The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned with proscribing 'tortures' and other 'barbarous' methods of punishment." *Id.* Accordingly, the pillory – and its "modern" equivalent, the hitching post – were already considered "cruel and unusual" before the Eighth Amendment was ever adopted, let alone applied to the states by the rulings of this Court.

D. IN CASES WHERE THE RIGHT ALLEGED TO HAVE BEEN VIOLATED IS READILY APPARENT, NO CLARIFYING CASE LAW IS NECESSARY

Even if the pillory had not been abolished over a century ago, and even if the principles articulated by *Gates v. Collier*, 501 F. 2d 1291, 1306 (5th Cir. 1974), *Williams v. Burton*, 943 F. 2d 1572 (11th Cir. 1991), and *Ort v. White*, 813 F. 2d 318, 327 (11th Cir. 1987) were not controlling, the Eleventh Circuit has recognized that there are certain cases where the defendant's conduct is so obviously unconstitutional that it is not necessary that there be a factually similar precedent articulating "clearly established law." In *Smith v. Mattox*, 127 F. 3d 1416 (11th Cir. 1997), the Court rejected a police officer's defense of qualified immunity – despite the absence of a precedent with substantially similar facts staking out a "bright line" of illegality – where an unarmed, non-resisting suspect claimed that the officer had deliberately and without provocation broken his arm during the course of an arrest. In the words of the Eleventh Circuit, the unconstitutionality of the alleged conduct in *Smith* was "readily apparent even without clarifying case law." The same can be said in the case at bar, where the Respondents' practice of inflicting pain and discomfort on the "hitching post" is "surely [as] wanton, and arguably malicious and sadistic," as the conduct proscribed by the old Fifth Circuit in *Gates v. Collier, supra*, 501 F. 2d at 1306. Even if there were a complete dearth of prior case law, the impropriety of torturing inmates on the hitching post should have been as "readily apparent" at the turn of the 20th century as

that of an officer maliciously breaking the arm of a suspect, and accordingly, there is no basis for awarding qualified immunity to the Defendants.

In a similar vein, the Eleventh Circuit held in *McMillian v. Johnson*, 88 F. 3d 1554 (11th Cir. 1996), that an Alabama sheriff was not entitled to summary judgment based upon qualified immunity in a case brought by a pretrial detainee who complained of being housed on Death Row. Despite the fact that there were no prior cases prohibiting Death Row confinement of pretrial detainees, the law was held to be clearly established that punishing a pretrial detainee is unconstitutional. "When McMillian was transferred to Holman's death row, clearly established law in this circuit prohibited imposing on a pretrial detainee conditions of detention that amount to punishment." 88 F. 3d at 1565, citing *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872 (1979); and *Hamm v. Dekalb County*, 774 F. 2d 1567, 1572 (11th Cir. 1985), *cert. denied*, 475 U.S. 109, 106 S. Ct. 1492 (1986).

The fact that there are no prior case decisions outlawing the hitching post *per se* is not determinative of the qualified immunity issue. "[F]or the law to be clearly established, a court need not have found the very action in question unlawful; what is essential is that the action's unlawfulness be apparent in light of preexisting law." 88 F. 3d at 1565, citing *Jordan v. Doe*, 38 F. 3d 1559 (11th Cir. 1994) (emphasis added). "[W]e do not view the absence of a case factually similar to the extraordinary allegations in this case as an indication that the law was not clearly established that confining pretrial detainees on death row to punish them is unconstitutional. *Bell's* prohibition on any pretrial punishment, defined to include conditions

imposed with an intent to punish, should have made it obvious to all reasonable officials . . . that holding McMillian on death row to punish him before he was tried violated McMillian's due process rights." 88 F. 3d at 1565. By the same token, the prohibition on unnecessary punitive restraints contained in *Gates v. Collier*, *Ort v. White*, and *Williams v. Burton*, *supra*, "should have made it obvious" that it was unconstitutional to place Larry Hope on the hitching post and to leave him there unnecessarily.

The Eleventh Circuit's rulings in *Smith v. Mattox* and *McMillian v. Johnson* are consistent with this Court's analysis in *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997), which emphasizes the clarity of the guidance given by a court's decision over the specificity of its fact pattern. In *Lanier*, this Court made the following observation:

> "The easiest cases don't even arise. There has never been . . . a section 1983 case accusing child welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal liability]."

117 S. Ct. at 1227-28. The same would be true if prison officials were cutting off fingers, inserting bamboo shoots under fingernails, or reinstating the pillory in order to appear "tough on crime". Qualified immunity was never intended to be "an impenetrable shield, because of which all manner of constitutional violations by public officers must be tolerated." *Cooper v. Smith*, 89 F. 3d 761 (11th Cir. 1996). Certainly this is a case in which the rights violated

are so basic and obvious that the Petitioner should be entitled to ask a jury for compensation.

CONCLUSION

This court should grant the writ and reverse the judgment below. Petitioner is entitled to a trial to prove his claims.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12150

D. C. Docket No. 96-02968-CV-BU-S

LARRY HOPE,

Plaintiff-Appellant,

versus

MARK PELZER, GENE MCCLARAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed February 02, 2001)

Before TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge.

BIRCH, Circuit Judge:

In this case, we decide whether an inmate's Eighth and Fourteenth Amendment rights were violated when prison guards handcuffed him to a hitching post on two occasions, one of which lasted for seven hours without regular water or bathroom breaks. The district court granted summary judgment for the defendant prison

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* Honorable Robert L. Vining, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

guards because they were entitled to qualified immunity. We AFFIRM.

I. BACKGROUND

Plaintiff-Appellant Larry Hope was an inmate at Limestone Correctional Facility ("Limestone") in 1995, where he was assigned to the chain gang. On two occasions, Hope was transported from the chain gang work site back to Limestone, where he was cuffed to a hitching post in the yard.

On 11 May 1995, Hope was engaged in a verbal altercation with another inmate on the chain gang. Both men were escorted back to Limestone, where they were cuffed to the hitching post. Hope was released two hours later, after the guards captain determined that the altercation was caused by the other inmate. While on the post, Hope was offered water and a bathroom break every fifteen minutes, and his responses to these offers were recorded on an activity log. He was examined by a prison nurse that evening, and showed no signs of injury.

On 7 June 1995, Hope was engaged in a physical altercation at the work site with a prison guard. There is a dispute about who started the fight, but Hope states that one of the guards started choking him because he fell asleep on the bus en route to the work site, and therefore did not exit promptly with the other inmates. Hope was again brought back to Limestone, where he was again cuffed to the hitching post. This time, Hope was cuffed to the post for seven hours without a shirt. During this seven hour period, Hope was given water only once or

twice, and was given no bathroom breaks.[1] He was examined by the prison nurse, who noted no injuries. Hope has since been released from prison.

Hope brought suit in federal court against eight Limestone guards,[2] alleging that his Eighth[3] Amendment rights had been violated, and seeking monetary damages. The district court ordered the defendants to submit special reports outlining their knowledge of the incidents Hope described in his complaint. The court considered these special reports as a motion to dismiss, and granted the motion on qualified immunity grounds. Hope appeals.

II. DISCUSSION

We review a summary judgment appeal *de novo*, and view all facts in the light most favorable to the nonmoving party. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir.1998).

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[1] We note that there is no activity log for this period that Hope spent on the hitching post, despite the policy that requires such a report. Because there is no report, Hope's allegations about the lack of water and bathroom breaks are uncontested.

[2] Hope subsequently moved to dismiss his claims against defendants Ted Loggins, Greg Jackson, Gary McGee, Joseph Stephenson, and James Kent, leaving only Mark Pelzer, Gene McClaran and Jim/Keith Gates. In the same motion, he dropped a claim for excessive force.

[3] Hope argues that he also brought a Fourteenth Amendment due process claim. However, the district court found that the due process complaint was not signed and had no evidence of service of process. Therefore, it did not address this claim, and it is not before us now.

A. Hope's Constitutional Rights Were Violated

Alabama Department of Corrections ("DOC") policy calls for inmates to be cuffed to a hitching post[4] to "eliminate the possibility of disruption of the work squad and to discourage other inmates from exhibiting similar conduct." R1-11-8.[5] Hope argues that his Eighth Amendment right to be free from cruel and unusual punishment was violated ~~when he was cuffed to the hitching~~ post on 11 May and 7 June 1995 in accordance with this policy. We agree.[6]

The Eighth Amendment prohibits "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society' . . . or which 'involve the unnecessary and wanton infliction of pain.' " *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S.Ct. 285, 290 (1976) (citations omitted). Because Hope

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[4] The DOC refers to the hitching post as a "restraining bar" or a "rail." Here, we will use the term "hitching post," but the holding applies to any similar object that inmates are cuffed to in the manner described in this opinion.

[5] The written policy, Alabama Administrative Regulation Number 429, is not in the district court record, and, therefore, we will not address it here.

[6] This section of the opinion will discuss Eighth Amendment jurisprudence as it applies to Hope's case. For an analysis of the historical background of an Eighth Amendment claim against the use of a hitching post, see *Austin v. Hopper*, 15 F.Supp.2d 1210, 1250-66 (M.D.Ala.1998). Because Hope is a member of the plaintiff class in *Austin*, that court discusses his allegations in its opinion. The case before us is a separate action, in that Hope is asking for monetary damages rather than injunctive relief, but the *Austin* court's analysis is sound and directly applicable to our case.

was not placed on the hitching post as the result of a court sentence or sentencing statute, he must prove a subjective violation of his rights as well as the objective violation of the Eighth Amendment. *See Wilson v. Seiter*, 501 U.S. 294, 300, 111 S.Ct. 2321, 2325 (1991).

1. The Subjective Requirement

The subjective component of Eighth Amendment jurisprudence requires a showing that the defendants were wanton in their actions, as opposed to merely negligent. *Id.* at 302, 111 S.Ct. at 2326. To overcome this subjective test, Hope must show that the officials knew that placing him on the hitching post created a "substantial risk of serious harm and [that they] disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970, 1984 (1994).[7] The Court in *Farmer* emphasized that the officials need only be aware of the *risk* of harm, as opposed to being aware of actual harm. *Id.* at 842, 114 S.Ct. at 1981.

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[7] We disagree with the district court in *Austin* in so far as the opinion applies the heightened subjective test found in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986), to the subjective element of Hope's claim. *Austin*, 15 F.Supp.2d at 1255. The *Whitley* test applies when officials act "in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 320, 106 S.Ct. at 1084. Because the officers drove Hope back to Limestone before placing him on the hitching post, they no longer faced the type of exigent circumstances required to invoke the *Whitley* standard. We note, however, that despite applying the more stringent *Whitley* standard to Hope's case, the district court in *Austin* still found that Hope had met the subjective component of the Eighth Amendment analysis. *Austin*, 15 F.Supp.2d at 1265.

Hope has met the burden of showing that the prison officials were aware that placing him on the hitching post created a substantial risk of harm, and that they did nothing to abate that risk. First, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* Hope was cuffed standing to a hitching post, with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet. This is uncontested evidence of deliberate indifference to the risk of harm to Hope.

Second, in 1994, the Department of Justice ("DOJ") conducted an examination of the Easterling Correctional Facility in Alabama, and advised the DOC that use of the hitching post constituted improper corporal punishment and was not an acceptable use of restraints. *Austin*, 15 F.Supp.2d at 1249.[8] In this report, the DOJ recommended that the DOC cease use of the hitching post in order to meet constitutional standards. The DOJ report listed the health and safety risks associated with the use of the hitching post. The DOC replied to the report, stating that

[8] Although this DOJ report was not before the district court in Hope's case, we are taking judicial notice of the report as permitted by Federal Rule of Evidence 201. *See United States v. Rey*, 811 F.2d 1453, 1457 n. 5 (11th Cir.1987) ("A court may take judicial notice of its own records and the records of inferior courts."); *National Fire Ins. Co. of Hartford v. Thompson*, 281 U.S. 331, 336, 50 S.Ct. 288 (1930) ("We may notice the record of that case in this court.").

it had determined that use of the hitching post "is not unconstitutional and is necessary to preserve prison security and discipline." *Id.* In response, the DOJ informed the DOC that, "[a]lthough an emergency situation may warrant drastic action by corrections staff, our experts found that the 'rail' is being used systematically as an improper punishment for relatively trivial offenses. Therefore, we have concluded that the use of the 'rail' is without penological justification." *Id.* at 1249-50. This exchange between the DOJ and the DOC demonstrates that the DOC was aware of the substantial risk of harm created by use of the hitching post for prolonged periods of time. We find that Hope has satisfied the subjective requirement of the Eighth Amendment test.

2. The Objective Requirement

The standard for an objective violation of the Eighth Amendment is whether a punishment " 'involve[s] the unnecessary and wanton infliction of pain' . . . or [is] grossly disproportionate to the severity of the crime." *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399 (1981) (citations omitted). Because there is no clear test for what actions meet this standard, "the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Id.* (citations omitted). This standard of decency must be balanced, of course, against the prison officials' need to keep the prison safe. However, an infliction of pain "without penological justification" is considered to be "unnecessary and wanton." *Id.* (citations omitted).

Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons. In *Gates v. Collier*, 501 F.2d 1291 (5th Cir.1974), in regard to "handcuffing inmates to the fence and to cells for long periods of time" and other such punishments, we stated that "[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Gates*, 501 F.2d at 1306.

Hope has met the objective standard of the Eighth Amendment. While on the hitching post in June, Hope was denied basic human necessities, such as water, and was even taunted by the guards in the process. While cuffed to the hitching post, Hope ran the obvious risk of becoming dehydrated or sunburned, injuring his wrists, or being ridiculed and harassed by other inmates on their way back from the work site, among other injuries.[9] The policy and practice of cuffing an inmate to a hitching post past the time when he constitutes a threat to himself or others violates the "broad and idealistic concepts of dignity, civilized standards, humanity and decency," *Estelle*, 429 U.S. at 102, 97 S.Ct. at 290 (quotation omitted), embodied in the Eighth Amendment.

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[9] In the words of the district court in *Austin*, "inmates placed upon the hitching post suffered extreme pain, anguish, humiliation, mental suffering, and resulting physical soreness and depression." *Austin*, 15 F.Supp. at 1256.

3. The Policy and Practice are Unconstitutional

We find that cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment. This violation is exacerbated by the lack of proper clothing, water, or bathroom breaks. We do not address the situation where this punishment or one similar to it is used for a short period of time after a physical altercation or other serious threat to prison safety to quell a disturbance and protect the safety of those around him. It is possible that there could be situations where an inmate would need to be temporarily cuffed to a stationary object for non-punitive purpose while the guards restored order. This is not that situation.

Our finding today is consistent with our ruling in *Ort v. White*, 813 F.2d 318 (11th Cir.1987), where a prison official refused to allow inmate Ort to drink water while on the chain gang until Ort agreed to work. In *Ort*, we found the official's action to be constitutional, in part because Ort "essentially had the keys to the water keg in his own pocket. Whenever he agreed to abide by the prison rules, he would be given water just like everyone else." *Id.* at 326. While the DOC claims that Hope would have been released from the hitching post had he asked to return to work, the evidence suggests that is not the case. First, Hope never refused to work. During the May incident, he was the victim in an altercation on the work site, but he never refused to do his job. During the June incident, Hope was involved in an altercation with prison guards. There is nothing in the record, however, claiming that he refused to work or encouraged other inmates to refuse to work. Therefore, it is not clear that the solution

to his hitching post problem was to ask to return to work. Second, Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post on both occasions. Given the facts, it is improbable that had Hope said, "I want to go back to work," a prison guard would have left his post at Limestone to drive Hope back to the work site. It is more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson.

Herein lies the crux of our finding that the guards' placing Hope on the hitching post for extended periods of time was unconstitutional: there is no evidence in the record that Hope posed a continuing threat to prison safety while being transported from the work site to the prison or once he arrived at the prison itself. There is no evidence that Hope would have been a continuing threat had he remained at the work site. In *Williams v. Burton*, 943 F.2d 1572 (11th Cir.1991) (per curiam), we found that the prison officials did not violate the Eighth Amendment by using four-point restraints to control an inmate who "was trying to incite other inmates to join him in a prison disturbance . . . [that] posed a significant security concern." *Williams*, 943 F.2d at 1575. We stated, however, that,

> once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his

> resistance to authority is an Eighth Amendment violation. *Id.* at 1575-76.

This rule was also applied earlier in *Ort*, where we acknowledged that, "we might have reached a different decision if later, once back at the prison, officials had decided to deny appellant water as punishment for his refusal to work." *Ort*, 813 F.2d at 326.

For the above-stated reasons, we find that the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment. It is our intention that this holding serve as a bright-line rule for any future case involving the use of a hitching post by prison authorities. *See County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998) ("[I]f the policy of avoidance [of constitutional issues] were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment of both officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.").

B. The Guards Are Entitled to Qualified Immunity

Despite the unconstitutionality of the prison practice and, therefore, the guards' actions, there was no clear, bright-line test established in 1995 that would survive our circuit's qualified immunity analysis. Therefore, we affirm the district court's grant of summary judgment for the defendants on qualified immunity grounds.

Public officials are entitled to qualified immunity from monetary damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). The qualified immunity test is "one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith." *Swint v. City of Wadley, Ala.*, 51 F.3d 988, 995 (11th Cir.1995).

The law on qualified immunity in our circuit is clear. When analyzing a qualified immunity defense, "[w]e look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Id.* (citations omitted). Thus, "to be 'clearly established,' the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory so that a similarly situated, reasonable government agent would be on notice that his or her questioned conduct violates federal law under the circumstances." *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1185 (11th Cir.1994).

Hope argues that several of our cases, including *Gates* and *Ort*, established a bright-line rule against use of the hitching post. While we recognize that the inappropriateness of the hitching post could be inferred from these opinions, a bright-line rule for qualified immunity purposes "is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances." *Lassiter v. Alabama A&M Univ.*

Bd. of Tr., 28 F.3d 1146, 1150 (11th Cir.1994) (citations omitted). It is important to analyze the facts in these cases, and determine if they are "materially similar" to the facts in the case in front of us. *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269-70 (11th Cir.1996) (per curiam) (citations omitted). Though analogous, the facts in *Gates* and *Ort* are not "materially similar" to Hope's situation. In *Ort*, the defendant was refused water while at a work site, until he agreed to do his job of carrying water to the work site. *Ort*, 813 F.2d at 326. *Gates* was an even more distinct case, as it involved an effort to make substantial changes based on the unconstitutional "conditions and practices in the maintenance, operation and administration" of a prison. *Gates*, 501 F.2d at 1295. We do not find that the language in *Gates*, *Ort*, or any other Eleventh Circuit or Supreme Court opinion established that impermissible use of the hitching post constitutes cruel and unusual punishment clearly enough that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

III. CONCLUSION

The practice of leaving an inmate cuffed to a hitching post when he no longer presents a threat to himself or those around him is a violation of that prisoner's Eighth Amendment right to be protected from cruel and unusual punishment, particularly when he is denied water and bathroom breaks. In 1995, however, there was no case law in this circuit with facts and legal analysis clear enough to serve as a bright-line rule establishing this violation, so the prison guards cannot be held financially responsible

for their actions. Accordingly, we AFFIRM the judgment of the district court.

United States Court of Appeals

For the Eleventh Circuit

No. 00-12150

District Court Docket No.
96-02968-CV-BU-S

LARRY HOPE,

Plaintiff-Appellant,

versus

MARK PELZER, Sergeant, Correctional Officer II, GENE MCCLARAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

JUDGMENT

(Filed Febr. 2, 2001)

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: February 2, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12150-DD

LARRY HOPE,

Plaintiff-Appellant,

versus

MARK PELZER, Sergeant, Correctional Officer II,
MCCLARAN, Correctional Officer I,
KENT, Correctional Officer I,
JACKSON, Correctional Officer I,
MAGUEE, Correctional Officer I,
STEPHEN, Officer, COI,
LAUGAN, Correctional Officer I,
GATES, Lieutenant,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed May 7, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge.

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* Honorable Robert L. Vining, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch
UNITED STATES CIRCUIT JUDGE

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(2)

Supreme Court, U.S.
FILED

No. 01 309 JUL 28 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff, vs. MARK PELZER; GENE McCLARAN; GREG JACKSON; GARY McGEE; JOSEPH STEPHENSON; JIM GATES, also known as KEITH GATES; JAMES KENT; and TED LOGGINS, Defendants.	)	CV 96-BU-2968-S

MEMORANDUM OPINION

(Filed March 24, 2000)

The magistrate judge assigned this matter filed a report and recommendation on March 10, 2000, recommending (1) that the plaintiff's claims for the use of excessive force against concerning a June 7, 1995, altercation be dismissed and that the plaintiff's claims against defendants Greg Jackson, Gary McGee, Joseph Stephenson, James Kent, and Ted Loggins be dismissed premised on the request of the plaintiff and (2) the motions for summary judgment of the remaining defendants be granted on the basis of qualified immunity and that this cause be dismissed with prejudice. (Doc. 45). The plaintiff filed objections to the report and recommendation on March 20, 2000. (Doc. 46).

The plaintiff argues that the magistrate judge's finding that the defendants in this case are entitled to qualified immunity is inconsistent with recent holdings in cases decided in the United States District Court for the Middle District of Alabama. "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 626-27 n.4 (11th Cir. 1997), quoted in *Florex v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998). Furthermore, this case is clearly distinguishable from the case of *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00), which is cited by the plaintiff and attached to his objections. In the case presently before the court, the plaintiff, unlike Fountain, did not allege that he suffered any physical condition which was exacerbated by being placed on the bar, he was provided water on one or two occasions, and he was not denied restroom breaks. To the extent that the plaintiff alleges that guards taunted him about being on the restraining bar and by providing water to the security dogs and then spilling it out of the container, that conduct is not attributed to any defendant presently before this court.

Government officials exercising a discretionary function are entitled to qualified immunity from damages unless their acts or decisions contravene clearly established constitutional or statutory rights of which a reasonable official should have knowledge. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2751, 73 L. Ed. 2d 396 (1982). The "contours of the rights must

be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 636, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The Court specifically finds at the time of the conduct alleged in this case, the law on the use of the restraining bar was not so clearly established as to defeat the defendants' assertion that they are entitled to qualified immunity on the plaintiff's claims that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment when he was placed on the hitching post, and that he was denied due process in violation of the Fourteenth Amendment prior to being placed on the bar.

Having carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation and the objections filed by the plaintiff, the Court is of the opinion that the magistrate judge's report is due to be and is hereby ADOPTED and his recommendation is ACCEPTED. The Court EXPRESSLY FINDS that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law. Accordingly, defendants' motions for summary judgment are due to be GRANTED and this action is due to be DISMISSED WITH PREJUDICE. A Final Judgement will be entered.

DONE, this the 24th day of March, 2000.

/s/ H. Dean Buttram, Jr.
H. DEAN BUTTRAM, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff,	)	CV 96-BU-2968-S
vs.	)	
MARK PELZER; GENE McCLARAN; GREG JACKSON; GARY McGEE; JOSEPH STEPHENSON; JIM GATES, also known as KEITH GATES; JAMES KENT; and TED LOGGINS, Defendants.	)	

FINAL JUDGMENT

(Filed March 24, 2000)

In accordance with the Memorandum Opinion entered contemporaneously herewith and with Rule 58, *Fed. R. Civ. P.*, it is hereby **ORDERED, ADJUDGED,** and **DECREED**

(1) that the plaintiff's claims for the use of excessive force against concerning the June 7, 1995, altercation be dismissed as to all the defendants;

(2) that all of the plaintiff's claims against defendants Greg Jackson, Gary McGee, Joseph Stephenson, James Kent, and Ted Loggins be dismissed;

(3) the motions for summary judgment of the remaining defendants, Mark Pelzer, Gene McClaran, and Jim Gates, be granted on the basis of qualified immunity and that this cause be dismissed with prejudice;

(4) Costs are taxed to the plaintiff.

DONE, this the 24th day of March, 2000.

/s/ H. Dean Buttram, Jr.
H. DEAN BUTTRAM, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
v.	)	
MARK PELZER; GENE MCCLARAN; GREG JACKSON; GARY MCGEE; JOSEPH STEPHENSON; JIM GATES also known as KEITH GATES; JAMES KENT; and TED LOGGINS, Defendants.	)	CV-96-BU-2968-S

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed March 10, 2000)

Plaintiff Larry Hope ("the plaintiff") was incarcerated at the William E. Donaldson Correctional Facility at the time he filed this *pro se* action pursuant to 42 U.S.C. § 1983, alleging that he had been deprived of rights, privileges, or immunities afforded him under the Constitution of the United States of America. In accordance with the usual practices of this court and 28 U.S.C. § 636(b), the complaint was referred to a magistrate judge for a preliminary report and recommendation. *See McCarthy v. Bronson*, 500 U.S. 136, 111 S. Ct. 1737, 114 L. Ed. 2d 194 (1991). It was subsequently reassigned to the undersigned magistrate judge.

I. BACKGROUND AND PROCEDURAL HISTORY

The plaintiff alleges in his original complaint that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment while previously incarcerated at Limestone Correctional Facility and names as defendants, Mark Pelzer, Gene McClaran, Greg Jackson, Gary McGee, Joseph Stephenson, Jim Gates, James Kent, and Ted Loggins. He attached an affidavit, prison records, and copies of photographs to the complaint. As compensation for the alleged constitutional violations, the plaintiff seeks compensatory and punitive damages.[1]

On December 31, 1996, the court entered an Order for Special Report, directing that copies of the complaint in this action be forwarded to each of the named defendants and requesting that they file a special report addressing the factual allegations of the plaintiff's complaint. (Doc.

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[1] Although the plaintiff purports to seek injunctive and declaratory relief in addition to damages (see doc. 1, p. 3), it is clear that his claims relate to completed acts in the past for which damages would be the only avenue of relief. Further, as the plaintiff has been released from the Alabama correctional system, he is no longer housed at the Limestone Correctional Facility where these claims are alleged to have occurred; therefore, he no longer has standing to seek injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987). Although the plaintiff's claims for injunctive relief have been rendered moot due to his release, the "[t]ransfer [or release] of a prisoner does not moot a claim for money damages." *Cotterall v. Paul*, 755 F.2d 777, 780 (11th Cir. 1985), (citing *McKinnon v. Talladega County*, 745 F.2d 1360, 1362 (11th Cir. 1984)).

4).[2] The order listed the defendants identified by the plaintiff and his claims. It specified that the plaintiff was presenting Eighth Amendment claims concerning his being handcuffed to a "hitching post" on May 11, 1995, and June 7, 1995. (*Id.*, p. 3). The defendants were advised that the special report could be submitted under oath or accompanied by affidavits and, if appropriate, would be considered as a motion for summary judgment filed pursuant to Rule 56 of the *Federal Rules of Civil Procedure*. By the same order, the plaintiff was advised that after he received a copy of the special report submitted by the defendants, he should file counter-affidavits if he wished to rebut the matters presented by defendants in the special report. The plaintiff was further advised that such affidavits should be filed within twenty days after receiving a copy of the defendants' special report.

On February 10, 1997, the plaintiff filed a "Supplemental (sic) to Clerk of the Court," wherein he contended that the defendants placement of him on the "hitching post" violated his rights to procedural and substantive due process under the Fourteenth Amendment. (Doc. 41). It is a two page, unsigned document. There is no certificate of service attached showing that it was ever served on the defendants or their counsel.

On March 24, 1997, defendants Mark Pelzer, Gene McClaran, Gregory Jackson, Gary McGee, Joseph Stephenson, and Jim Gates filed a special report. (Doc. 11). It includes institutional incident reports, emergency

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[2] References herein to "Doc. ___" are to the particular pleading number assigned by the Clerk of the Court and located in the lower right-hand corner of the document.

and medical treatment reports, activity logs, and the affidavits of Pelzer, McClaran, Jackson, McGee, Stephenson, and Gates. On April 24, 1997, defendant James Kent filed a special report, including his affidavit. (Doc. 17). On September 27, 1997, defendant Ted Loggins filed a supplemental special report, including his affidavit. (Doc. 26). The plaintiff was notified that he would have twenty days to respond to the supplemental special report of Loggins, which the court intended to construe as a motion for summary judgment. (Doc. 28). The plaintiff was afforded the opportunity to file affidavits or other material if he chose. He was advised of the consequences of any default or failure to comply with *Fed. R. Civ. P.* 56. *See Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985).

Counsel for the plaintiff entered a notice of appearance on October 17, 1997, and filed a "Preliminary Response" to the defendants' special report. (Doc. 29 & 30). On November 3, 1997, counsel for the plaintiff filed a "Special Report and Brief in Response to Defendants' Motion for Summary Judgment." (Doc. 33). In this document, the plaintiff informed the court that he was waiving and withdrawing his claims for excessive force in connection with the June 7, 1995 fight, which led to his being put on the hitching post for the second time. (Doc. 33, p. 1). The plaintiff also informed the court that he wanted to dismiss defendants Loggins, Jackson, McGee, Stephenson, and Kent from the lawsuit. (*Id.*). The plaintiff states that the only claims he wants to pursue are those against defendants McClaran, Pelzer, and Gates in connection with the May 11, 1997, hitching post incident, and defendant Gates in connection with the June 7, 1997,

hitching post incident. (*Id.*, p. 2). He also filed a second affidavit in support of his claim. (Doc. 32). On December 29, 1997, he filed a "Supplemental Brief in Opposition to Summary Judgment." (Doc. 42).

On February 13, 1999, the court conducted a telephonic status conference in this matter. Premised on that conference, the court informed the parties that it would be treating the defendants' special reports as motions for summary judgment. Accordingly, the parties were afforded an opportunity to file any additional briefs or evidentiary material in support of their positions. (Doc. 36). The defendants filed a response to the court's order. (Doc. 37). The plaintiff filed a "Third Supplemental Brief in Opposition to Defendants' Motion for Summary Judgment." (Doc. 38).

On December 29, the plaintiff filed a motion seeking to stay this action until the United States District Court for the Middle District of Alabama decides a pending motion for class certification in the case of *Hicks v. Allen*, Case No. 96-D-854-N. (M.D. Ala. 4/16/99). (Doc. 39). According to the plaintiff's counsel, the present "case is one of approximately ten (10) in which Plaintiff's counsel represents inmates who have damage claims as a result of having been unconstitutionally pilloried on a device known as the 'hitching post.' " (Doc. 40, pp. 1-2). Counsel for the plaintiff herein have also informed the court that the present matter is also related to the case of *Austin v. James*, Case No. 95-T-637-N (M.D. Ala. 5/15/95), involving claims by 200-300 inmates who have been subjected to the "hitching post" during their incarceration and who are seeking injunctive relief and not damages. (Doc. 40, p. 2; Doc. 33, Attachment 2, pp. 1-2). The motion to stay will

be denied by a separate order entered contemporaneously with this report and recommendation.

II. SUMMARY JUDGMENT STANDARD

Because the special reports of the defendants are being considered as motions for summary judgment, the Court must determine whether the moving party, the defendants, are entitled to judgment as a matter of law. Summary judgment may be granted only if there are no genuine issues of material fact. *Fed. R. Civ. P. 56.* In making that assessment, the Court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden of proof is upon the moving party to establish his prima facie entitlement to summary judgment by showing the absence of genuine issues and that he is due to prevail as a matter of law. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). Once that initial burden has been carried, however, the non-moving party may not merely rest upon his pleadings, but must come forward with evidence supporting each essential element of his claim or to refute a claim of qualified immunity. *See Celotex Corp.*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Barfield v. Brierton*, 883 F.2d 923 (11th Cir. 1989). Unless the plaintiff, who carries the ultimate burden of proving his action and the absence of qualified immunity, is able to show some evidence with respect to each element of his claim, all other issues of fact become immaterial, and the moving party is entitled to judgment

as a matter of law. *See Celotex Corp.*, 477 U.S. 317; *Bennett v. Parker*, 898 F.2d 1530 (11th Cir. 1990).

III. FACTS

A. May 11, 1995 Incident

Applying the above standard, the following facts are undisputed or, if disputed, are taken in a light most favorable to the plaintiff. The plaintiff was incarcerated at the Limestone Correction Facility in 1995 and assigned to the chain gang. On May 11, 1995, while on the chain gang, the plaintiff and another inmate got into a verbal altercation. Officer McClaran concluded that the altercation was the plaintiff's fault and ordered him put on the hitching post for being "disruptive to the work squad." (Doc. 32, ¶ 5). According to the plaintiff, he was placed on the hitching post at 12:30 p.m. by Sergeant Pelzer, (*Id.*, ¶ 7). He notes, however, that the incident report shows that Officers Gates and Dempsey[3] placed him on the restraining bar. (*Id.*; *See also* Doc. 11, Exhibit 7, Incident Report. p. 2). No disciplinary write-up or hearing preceded his being placed on the bar.

Captain David J. Wise later concluded that the other inmate was responsible for the altercation and ordered the plaintiff released at 2:40 p.m. According to the Department of Corrections "Activity Log" for the two hours the plaintiff was restrained on the bar, he was offered water and a restroom break every fifteen minutes. (Doc. 11, Activity Log). Of the nine times he was offered

[3] Officer Dempsey is not named as a defendant herein.

water or a restroom break, the plaintiff refused every offer of water and all but one offer of a restroom break. (*Id.*).

A physical examination of the plaintiff was conducted by an institution nurse at approximately 6:50 p.m. The examination revealed no signs of bruises, contusions, abrasions, lacerations, trauma, or illness. (Doc. 11, Hope Emergency/Treatment Record).

B. June 7, 1995 Incident

On June 7, 1995, the plaintiff was involved in another altercation when, according to him, "a correctional officer who had cursed [him] and grabbed [him] by the neck because [he] was sleeping on the bus on the way to a work site." (Doc. 32, ¶ 11). Because he began choking, he attempted to get the officer to release his grip. At that time, other officers arrived and "subdued, handcuffed, placed [him] in leg irons, transported him back to Limestone,[4] and put [him] on the hitching post" by

[4] According to the defendants, at approximately 10:30 a.m., Officer James Kent instructed the inmates on the bus to exit. After the order was repeated several times and five inmates, including the plaintiff failed to respond, Officer Loggins entered the bus and instructed the plaintiff to get off. The plaintiff responded to Loggins by saying "fuck you." (Doc. 17, Ex. A, Kent Affidavit, pp. 1-2; Doc. 26, Loggins Affidavit, p. 2). He also started towards the officer in an aggressive manner. He reached out to grab Loggins by the throat. (*Id.*). Officer Jackson stepped onto the bus and saw the plaintiff trying to grab Loggins around the neck. (Doc. 11, Ex. 3, Jackson Affidavit, pp. 1-2). Jackson was trying to help Loggins with the plaintiff when they all tripped and fell off the bus. Officers Loggins, Kent,

Loggins, Kent, Jackson, Stephenson and Mcgee.[5] (*Id.*, ¶ 13).

According to the plaintiff's affidavit that is attached to the original complaint, when he was returned to the institution, he was taken to the health care unit where he did not receive any treatment for his injuries. (Doc. 1, Plaintiff's Affidavit, p. 1). He was examined by Nurse Wilda Nichols at about 11:35 a.m. (*Id.*, Medical Record). Nichols observed that the plaintiff's speech was normal, he had a few scattered bumps on his left shoulder, a reddened area to the right shoulder, no bleeding, no knots on his head, he denied visual disturbances, and he ambulated well. Nichols noted that no treatment was needed at that time. (*Id.*). The plaintiff was then placed on the hitching post without a shirt, in the sun, for approximately seven hours.

The plaintiff is only slightly taller than the hitching post itself so his arms grew tired from being handcuffed so high. He was given water only once or twice during

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Mesler, and the plaintiff fell on top of Jackson. (*Id.*, pp. 1-2). Officer Joseph Stephenson observed the officers and plaintiff fall off the bus from about thirty five yards away and ordered the remainder of the inmate squad to sit on the ground. Officers Jackson, Loggins, and Kent handcuffed the plaintiff. (Doc. 11, Ex. 5, Stephenson Affidavit, pp. 1-2). Officer Pelzer was conducting security checks on the other inmate squads and arrived at the scene after the altercation. He helped place leg irons on the plaintiff and escorted him to the security vehicle. (Doc. 11, Pelzer Affidavit, pp. 1-2). The plaintiff was taken to the health care unit at the institution at about 10:50 a.m.

[5] In his affidavit, defendant McClaran states that he placed the plaintiff on the restraining bar. (Doc. 11, Ex. 2, p. 1).

the seven hours he was restrained, and he was teased by two unidentified officers when he requested water. (Doc. 32, ¶¶ 18, 19). The guards brought a cooler of ice and water to the hitching post area, gave some to the security dogs first, then moved the cooler closer to the plaintiff, removed the lid, and kicked it over. (Doc. 1, the plaintiff's affidavit, p. 2). He also states that "at one point during the hottest part of the day [he] was left without water for at least three hours." (Doc. 32, ¶ 18).

The plaintiff did not receive a disciplinary charge, behavior citation, or any hearing at any time as a result of the altercation at the bus. (Doc. 32, ¶ 21).

IV. DISCUSSION

As already discussed, the plaintiff, at most, appears to be asserting claims (1) that certain defendant officers used excessive force on him and (2) that certain officers violated his right to procedural and substantive due process and subjected him to cruel and unusual punishment by placing him on the restraining bar on May 11, 1995, and June 7, 1995. His November 3, 1997, response seeks to withdraw his claim that the officers used excessive force concerning the June 7 incident at the bus. He further requests that the court dismiss defendants Loggins, Jackson, McGee, Stephenson, and Kent from the lawsuit entirely. Premised on the plaintiff's response, his excessive force claim in connection with the June 7 incident is due to be dismissed with prejudice. Further, defendants Loggins, Jackson, McGee, Stephenson, and Kent are also due to be dismissed with prejudice on all claims. The

only defendants remaining in the lawsuit are Mark Pelzer, Gene McClaran, and Keith Gates. The plaintiff's only remaining claims are that the use of the restraining bar constituted a violation of due process and that he was subjected to cruel and unusual punishment.

A. Qualified Immunity

The defendants have raised the defense of qualified immunity. Government officials exercising a discretionary function are entitled to qualified immunity from damages unless their acts or decisions contravene clearly established constitutional or statutory rights of which a reasonable official should have knowledge. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2751, 73 L. Ed. 2d 396 (1982). "That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities." *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (footnote omitted). In *Lassiter*, the court stated:

> Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit. *See Malley v. Briggs*, 475 U.S. 335, 341-43, 106 S. Ct. 1092, 1096-97, 89 L. Ed. 2d 271 (1986). Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripped defendants of immunity.

Lassiter, 28 F.3d at 1149. *See also Anderson v. Creighton*, 483 U.S. 636, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (The "contours of the rights must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). The court in *Lassiter* also stated:

> For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that "what he is doing" violates federal law. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.
>
> The most common error we encounter, as a reviewing court, occurs on this point: courts must not permit plaintiffs to discharge their burden[6] by referring to general rules and to the violation of abstract "rights." *See Anderson*, 483 U.S. at 639-41, 107 S. Ct. at 3038-39 (even though the "general right [defendant] was alleged to have violated – the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there

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[6] "Once the qualified immunity defense is raised, plaintiffs bear the burden of showing that the federal 'rights' allegedly violated were 'clearly established,' *Barts*, 865 F.2d at 1190 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985))."

are exigent circumstances – was clearly established," [the] lower court should have "consider[ed] the argument that it was not clearly established that the circumstances with which [defendant] was confronted did not constitute probable cause and exigent circumstances") (emphasis added); *see also Barts*, 865 F.2d at 1190 (stating "clearly established" question at specific, factually defined, level).

"General propositions have little to do with the concept of qualified immunity," *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987). "If caselaw, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994); *accord Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994).[7] "The line is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances." *Barts*, 865 F.2d at 1194. And, as the *en banc* court recently accepted:

> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do not need to be materially similar. *See e.g., Edwards v. Gilbert*, 867 F.2d 1271, 1277 (11th Cir. 1989). *Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.*

Adams v. St. Lucie County Sheriff's Dept., 962 F.2d, 1563, 1573, 1575 (11th Cir. 1992), (Edmondson, J., dissenting) (emphasis added), approved *en banc*, 998 F.2d 923 (11th Cir. 1993). For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.

Because qualified immunity is a doctrine of practical application to real-life situations, courts judge the acts of defendant government officials against the law and facts at the time defendants acted, not by hindsight, based on later events. *See Hunter*, 502 U.S. at ___, 112 S. Ct. at 537 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be construed five years after the fact").

The subjective intent of government actor defendants plays no part in qualified immunity analysis. *Anderson*, 483 U.S. at 641, 107 S. Ct. at 3040 (despite that courts may inquire into "information possessed" by defendant, the defendant's "subjective beliefs . . . are irrelevant"); *Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S. Ct. 2806, 2810 86 L. Ed. 2d 411 (1985) (in *Harlow*, "this Court purged qualified immunity

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[7] "We leave open the possibility that occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law."

> doctrine of its subjective components"); *Hansen v. Soldenwagner*, 19 F.3d 573, 578 (11th Cir. 1994) ("[t]he Supreme Court in *Harlow* staked a new path for immunity law by abandoning the subjective element of 'good faith' immunity in favor of an objective test"). Objective legal reasonableness is the touchstone.

28 F.3d 1149-50 (footnotes retained) (emphasis in original). *Accord Gonzalez v. Lee County Housing Authority*, 161 F.3d 1290, 1295 (11th Cir. 1998); *Dolihite v. Maughon*, 74 F.3d 1027, 1040-41 (11th Cir.), *cert. denied*, 519 U.S. 870 (1996), *McCoy v. Webster*, 47 F.3d 404, 407 (11th Cir. 1995).

Addressing the actions of misbehaving inmates is clearly within the discretionary function of prison guards. *See Jordan v. Doe*, 38 F.3d 1559, 1566 (11th Cir. 1994) ("discretionary authority" includes "all actions of a governmental official that (1) 'were undertaken pursuant to the performance of his duties,' and (2) were 'within the scope of his authority' ") (quoting *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988)). The plaintiff does not contest this. Accordingly, the burden is on him to demonstrate that the defendants violated clearly established constitutional law by restraining the plaintiff on the "restraining bar."

"In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826-27 n. 4 (11th Cir.), *cert. denied*, 522 U.S. 966 (1997) (quoted in *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998)).

B. Cruel and Unusual Punishment

The Eighth Amendment prohibition against cruel and unusual punishment is triggered when a prisoner is subjected to an "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986). "In order to state a § 1983 cause of action against prison officials based on a constitutional deprivation resulting from cruel and unusual punishment, there must be at least some allegation of a conscious or callous indifference to a prisoner's rights. . . . " *Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). The plaintiff complains that the very act of placing him on a restraining bar for a period of hours as a form of punishment was cruel and unusual in violation of the Eighth Amendment. Furthermore, the plaintiff claims that he was left in the sun without a shirt and in an awkward position which left him with swollen, bruised wrists. The plaintiff also asserts that he was taunted by an unnamed guard when he requested water.

In response to the defendants' request for qualified immunity, the plaintiff replies: (1) "The hitching post is a variation of the pillory, and the Supreme Court recognized the unconstitutionality of the Pillory over a century ago;" (2) The defendants' conduct was unconstitutional under pre-1995 Eleventh Circuit law; and, (3) The defendants cannot claim qualified immunity because the rights violated are so readily apparent that clarifying law is not necessary.

The plaintiff relies on the Fifth Circuit case of *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1985),[8] and the Eleventh Circuit cases of *Ort v. White*, 813 F.2d 318, 327 (11th Cir. 1987) and *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991), *cert. denied*, 505 U.S. 1208 (1992). *Gates* dealt with a variety of complaints about prison practices and conditions, corporal punishment among them. The *Gates* court stated that "depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and cell for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit, or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods . . . run afoul of the Eighth Amendment.[9] *Id.*, at

[8] Decisions of the former Fifth Circuit Court of Appeals handed down prior to October 1, 1981, are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

[9] In *Gates*, the record was replete with evidence of physical abuse and brutality. The court stated:

> [Mississippi law] makes it illegal for any prison official other than the superintendent to order corporal punishment; and where corporal punishment is expressly authorized by the superintendent, it is limited to the whip or lash, which is not to be used for more than seven licks. While the evidence indicated that the lash had not been used at Parchman since 1965, the record was replete with innumerable instances of physical brutality and abuse in disciplining inmates who are sent to M[aximum] S[ecurity] U[nit]. These include administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and to cells for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods. Indeed, the district court found the superintendent and other prison officials acquiesced in these practices. Unquestionably, the district court correctly enjoined prison authorities from punishing inmates by these methods of corporal punishment. We have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.

Gates, 501 F.2d at 1306.

1306. The court in *Gates* did not address the restraining bar issues as to create a "bright line" rule that restraining an inmate who is disruptive to the work squad to a restraining bar would violate the inmate's constitutional rights. *Lassiter*, 28 F.3d at 49-50.

In *Ort*, the plaintiff appealed the district court's dismissal of his civil rights action wherein he claimed that prison officials violated his Eighth Amendment protection against cruel and unusual punishment and his Fourteenth Amendment due process rights. His claims were premised on allegations that he was denied water when he refused to work on details away from the institution and that he was confined to the prison sallyport for several hours at a time. The court upheld the dismissal of the Eighth and Fourteenth Amendment claims for the denial of water, finding that the actions were not punitive but rather an immediately necessary coercive, good faith

measure used to compel compliance with prison rules and regulations. The court did note that it "might have reached a different decision if later, once back at the prison, officials had decided to deny appellant water as punishment for his refusal to work." *Ort*, 813 F.2d at 326. Regarding his confinement in the sallyport to keep him from watching television after he attempted to circumvent the disciplinary order revoking his television privileges, which was part of his punishment for failing to follow orders in the field, the court held that the allegations did not support a § 1983 claim. *Ort*, 813 F.2d at 327-28.

In *Williams*, the plaintiff was placed in "four-point" restraints and "gaged [sic]" with gauze and tape for approximately twenty-eight and one-half hours after he created a "general disturbance" by threatening to kill correctional officers and spitting on one of the officers. When he was taken to his cell, the plaintiff continued to yell, threaten others with bodily harm, and spit on officials. The plaintiff challenged the district court's dismissal of his case on summary judgment. The court rejected his contention that the Eighth Amendments [sic] was violated by the use of the restraints and the gag. The court reasoned that the actions of the prison staff in using the restraints were intended to limit the plaintiff's ability to inflict physical harm against himself and others and the use of the gauze and tape were to prevent him from encouraging further unrest and to protect the officers from his assaultive behavior. *Williams*, 943 F.2d at 1575. Finally, the court found that the use of the restraints and gag were not " 'unnecessary and wanton infliction of pain' forbidden by the Eighth Amendment." *Id.*

Reviewing the foregoing authorities, as well as others, the court does not find that as of May and June 1995, the law was clearly established to the point of defeating the defendants' claim of qualified immunity on the Eighth Amendment claim. There was no case "stak[ing] out a bright line" that the handcuffing, shackling, or chaining of a prisoner to a fixed object, such as a restraining bar, for a period of up to seven hours violated the prohibition against cruel and unusual punishment. *Lassiter*, 28 F.3d at 1146 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993, *modified*, 14 F.3d 583 (11th Cir. 1994)). The "burden of proving the law to be clearly established [cannot be met] by stating constitutional rights in general terms." *Flores*, 137 F.3d at 1277 (quoting *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996)). The law must be such that the conduct of the defendants "violates the law in the circumstances." *Lassiter*, 28 F.3d at 1150. The plaintiff has failed to show any cases from the Unites [sic] States Supreme Court, the Eleventh Circuit Court of Appeals, or the Alabama Supreme Court addressing the specific question before this court.

While the plaintiff complains that he was hot and thirsty, it is undisputed that he was offered water at least once or twice on both occasions. Concerning the first incident, the record shows that he turned down offers of fluids eight times and to use the bathroom seven times. (Doc. 11, Hope Activity Log). He accepted the opportunity to use the restroom one time and does not state that it was thereafter denied. (*Id.*). Concerning the second incident, he states in his second affidavit that he was given water "once or twice during the entire seven hours, but that was not enough, and during the hottest part of

the day [he] was left without water for at least three hours." (Doc. 32, ¶ 18). As to the plaintiff's claim that he was taunted by a guard when he asked for water, that guard is not one of the defendants named in his lawsuit.[10]

Based on the foregoing considerations, the magistrate judge recommends that the motions for summary judgment filed by the defendants be granted on the plaintiff's Eighth Amendment claim. This court cannot conclude

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[10] The only reference to the identity of the guard is found in the Report and Recommendation of Magistrate Judge Vanzetta Penn McPhershon [sic] in *Austin v. James*, Case No. 95-637. She states:

> Officers gave Hope water perhaps as many as two times during the day. He remembered the incident because of the officers' behavior on one of the occasions that he asked for water. Nearby were two officers who were assigned to the "dog truck," the vehicle used to search for escapees. Hope asked them for water, but they teased him about being on the hitching post. He then asked another officer, one Odium, for water. In response, Odium went to the guard house and filled a cooler with ice and water, ostensibly to return it to Hope. Then one of the officers from the dog truck told him not to give Hope water. Odium obeyed and set the cooler on the ground near Hope; the dog truck officer removed pans from his truck, filled them with water from the cooler and "watered the dogs." . . . When he finished watering the dogs, the officer approached Hope with the cooler as if to give him water. Before he did so, however, he set the cooler on the ground perhaps three feet from Hope, "took the top off" and "kicked it over" so that the water ran onto the ground. . . . At that point, Hope had not been given water for two hours. Another hour passed before he was given any more. . . .

(Doc. 33, Ex. 2, pp. 43-44).

that the named defendants' actions in placing the plaintiff on the restraining bar were so contrary to then existing law so as to defeat their assertion of qualified immunity.

C. Due Process

The defendants' [sic] first assert that the plaintiff has not alleged a due process violation. (Doc. 37, p. 3). The complaint nowhere alleges a Fourteenth Amendment Due Process claim. The only place where it is asserted is in the "Supplement" that he filed on February 10, 1997. However, that document is not signed. The certificate of service only certifies that it is "true and correct." It does not evidence service on the defendants or their counsel. Assuming for the sake of argument in that the claim is properly before the court, summary judgment is due to be granted on the qualified immunity issue.

In opposition to the defendants' assertions of qualified immunity, the plaintiff cites the Eleventh Circuit's holdings in *Ort* and *Williams*, and *Dailey v. Byrnes*, 605 F.2d 858 (5th Cir. 1979), *opinion withdrawn* January 7, 1980. In *Ort*, while the court was discussing the plaintiff's Fourteenth Amendment Due Process claim, concerning the decision to deny the plaintiff water when he refused to work, the court stated:

> Once again we emphasize the distinction between punishment in the strict sense and immediately necessary coercive measures undertaken either to obtain compliance with a valid prison rule or in response to a spontaneous disturbance. Clearly, appellant would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison

> officials had summarily denied him water or imposed any other form of punishment without first affording him some type of disciplinary hearing. A fourteenth amendment violation occurs in this context where prison officers continue to employ force or other coercive measures after the necessity for such coercive action has ceased.

Ort, 813 F.2d at 327. In *Williams*, while discussing the restraints used by the defendants, the court stated:

> Plaintiff's third claim under the Eighth Amendment is a bit more difficult. Once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation. *Ort v. White*, 813 F.2d 318, 324 (11th Cir. 1987) (citing *Smith v. Dooley*, 591 F. Supp. 1157, 1168 (W.D. La. 1984), *aff'd*, 778 F.2d 788 (5th Cir. 1985)).

Williams, 943 F.2d at 1575-76. In *Dailey*, the plaintiff alleged that his confinement at the Escambia County Jail violated the Eighth Amendment in that he was subjected to "intolerable living conditions, inadequate diet, lack of proper medical services, [a] failure to provide exercise and an opportunity for fresh air, assaults by officers against him and the refusal of the sheriff to honor appearance bonds for his release." *Dailey*, 605 F.2d at 859. At the

conclusion of a non-jury trial, "the district court found neither the conditions at the jail nor the conduct of the officials to be unconstitutional." *Id.* In affirming the district court on all matters "except those arising out of one particular assault on the plaintiff," the court stated:

> The one area in which we cannot fully accept the district court's conclusions concerns the plaintiff's effort to obtain damages for injuries the plaintiff suffered when Frank Reid, one of the jailers, struck him in the head causing a partial loss of hearing. At trial officer Reid admitted that he had struck Dailey. The district court found that several days earlier, plaintiff had thrown water on Reid, and the blow, several days later, was in retaliation to the previous water throwing incident. Noting that plaintiff had sought no relief for the assault but the court had power to grant any relief mandated by the evidence in this pro se case, the district court concluded that it was not persuaded that a constitutional right had been violated on the proof presented by plaintiff, citing *Aulds v. Foster*, 484 F.2d 945 (5th Cir. 1973) and *Tolbert v. Bragan*, 451 F.2d 1020 (5th Cir. 1971), *See also Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866, 92 S. Ct. 83, 30 L. Ed. 2d 110 (1971).
>
> We have frequently held that 'an unjustified beating at the hands of prison officials gives rise to a section 1983 action.' *Bruce v. Wade*, 537 F.2d 850, 853 (5th Cir. 1976); *see, e.g., Aulds v. Foster*, 484 F.2d 945, 946 (5th Cir. 1973). In *Hamilton v. Chaffin*, 506 F.2d 904, 909 (5th Cir. 1975) quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.), *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973), we observed,

> [i]n determining whether the constitutional line has been crossed, the court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of casing [sic] harm. *Id.* 481 F.2d at 1033. *See Tolbert v. Bragan*, 451 F.2d 1020 (5th Cir. 1971).

The district court did not find that Reid was making a 'good faith effort to maintain or restore discipline'; nor did he find that Reid 'need[ed]' to strike the plaintiff in order to subdue him or for any other legitimate reasons. NO such reasons are obvious from this record. The district judge apparently believed that because Reid struck the plaintiff 'in retaliation' for the incident that had occurred several days before, the plaintiff's constitutional rights were not violated. But 'retaliation' for an incident that occurred several days earlier is more likely to be not an effort to restore order but instead either a motive for 'maliciously' striking the plaintiff 'for the very purpose of causing harm' or else summary, informal, unofficial and unsanctioned corporal punishment – an obvious due process violation.

Dailey, 605 F.2d at 860-61.

None of the cases cited by the plaintiff allow the conclusion that in May and June 1995, it was "clearly established" that the placement of an inmate on the

restraining bar in circumstances such as those before this court were sufficient to defeat the defendants' claim of qualified immunity on the plaintiff's due process claim. The plaintiff simply has not, and cannot under the applicable caselaw at the relevant time, defeated the claim of qualified immunity.

D. The Wrongfulness of the Defendants' Conduct was "Readily Apparent"

The plaintiff also asserts that the defendants are not entitled to qualified immunity because their violation of the plaintiff's rights was so readily apparent that clarifying law is not necessary. The plaintiff premises this argument on the fact that the Supreme Court recognized the unconstitutionality of the pillory[11] almost one hundred years ago. *See Weems v. United States*, 217 U.S. 349, 376-79, 30 S. Ct. 544, 553, 54 L. Ed. 793 (1909). The plaintiff asserts that "the main difference between the pillory of times past and the hitching post of today is that modern technology has substituted metal shackles for the 'holes' that used to be constructed of movable boards." (Doc. 42, p. 5).

In support of the claim that the defendants are not entitled to qualified immunity, the plaintiff cites *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), involving the district court's denial of a defendant's claim of qualified

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[11] "Pillory" is defined as "[a] wooden framework with holes through which an offender's head and hand are placed. A person put in a pillory usu[ally] had to stand rather than sit (as with the stocks). *Black's Law Dictionary* 1168 (7th ed. 1999).

immunity in an excessive force case under § 1983. In affirming the district court's denial of immunity, the Eleventh Circuit, after reciting the black-letter law concerning immunity, stated that "Fourth Amendment jurisprudence has staked no bright line for identifying force as excessive." *Smith*, 127 F.3d at 1419. The court went on:

> Smith cites no Fourth Amendment case, and this court has located none, in which a police officer subjected a previously threatening and fleeing arrestee to nondeadly force after the arrestee suddenly became docile. Smith therefore must show that Mattox's conduct was so far beyond the hazy border between excessive and acceptable force that Mattox had to know he was violating the Constitution even without caselaw on point. Smith does so, but barely. The hazy border between permissible and forbidden force is marked by a multifactored, case-by-case balancing test. The test requires weighing of all the circumstances, such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." In this inquiry, the officer's intent, whether evil or good, is irrelevant.
>
> The grunt and the blow that Smith asserts that he heard and felt while Mattox was on Smith's back, coupled with the severity of Smith's injury, push this case over the line. . . . We thus conclude that this case falls within *the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying caselaw.*

Mattox, 127 F.3d at 1419 (footnotes omitted) (emphasis added).

That the law on the use of the restraining bar was not "clearly established" as of the time of the defendants' conduct is amply demonstrated by the differing magistrate judge opinions cited by the parties dealing with the issue. The court further finds that the defendants' alleged conduct in this case does not fall "within the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying caselaw." *Mattox*, 127 F.3d at 1419.

V. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Accordingly, for the reasons stated above, the magistrate judge **RECOMMENDS** that the defendants' special reports be treated as motions for summary judgment and, as such, that the motions be **GRANTED** and this action is **DISMISSED WITH PREJUDICE**.

Any party may file specific written objections to this report and recommendation within ten (10) days from the date it is served in accordance with 28 U.S.C. § 636(b)(1).

The Clerk is **DIRECTED** to serve a copy of this report and recommendation upon the counsel for the plaintiff and upon counsel for the defendants.

DONE, this the 10th day of March, 2000.

/s/ John E. Ott
JOHN E. OTT
UNITED STATES
MAGISTRATE JUDGE

(3)

No. 01-309

Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Eleventh Circuit properly granted judgment in favor of the respondents based on qualified immunity.

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JURISDICTIONAL BASIS

The petitioner incorrectly states that the United States Court of Appeals for the Eleventh Circuit reversed in part and denied in part the decision of the District Court. (Pet. Brf. 1). The Eleventh Circuit affirmed the judgment of the District Court. (Pet. Brf. App. 13-14); *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001).

STATEMENT OF THE CASE

Inmates in the Alabama prison system are required to work while incarcerated; this includes farm work. If an inmate refuses to work with the assigned work squad or is disruptive to the work squad, then that inmate is not sent back to his dorm or cell. Instead, under a statewide Alabama Department of Corrections administrative rule, a metal post is used by prison officials to handcuff a prisoner. The inmate is handcuffed to a post (i.e., restraining bar) between waist and shoulder link depending on their height. The statewide rule directs that an inmate remain on the restraining bar until he agrees to return to work or his work squad comes in for the day. While on the restraining bar, the inmate receives food, water, and bathroom breaks. Inmates are given opportunities to express their desire to return to their work squad and begin working. If an inmate refuses to return to work, he is released from the restraining bar when his work squad returns to the facility.

This statewide administrative rule was instituted to encourage work and to keep order. In the past, allowing an inmate to go back and lay on his bed while others

worked only increased the incentive for an inmate to refuse to work, attempt to disrupt others working, or disrupt the work site. The restraining bar at Limestone Correctional Facility is a horizontal pole with rings about five feet tall that allowed handcuffs to be secured to it.[1] The restraining bar is referred to by the inmates and correctional officers as the "hitching post".

Inmate Larry Hope, the petitioner, was assigned to work on a farm squad at Limestone Correctional Facility. On two occasions, Hope disrupted the work squad and was placed on a restraining bar.

A. May 11, 1995, Incident

The petitioner was incarcerated at the Limestone Correctional Facility in 1995 and assigned to a farm squad. On May 11, 1995, while on the chain gang, the petitioner and another inmate got into a verbal altercation. Officer McClaran concluded that the altercation was the petitioner's fault and ordered the petitioner put on the hitching post for being "disruptive to the work squad." (Record on Appeal Doc. 32, ¶ 5[2] herein after Doc.). According to the petitioner, Sergeant Pelzer placed him on the hitching post at 12:30 p.m. (*Id.* ¶ 7). The incident report, however, shows Officers Gates and

[1] The allegation that the post was as high as the petitioners head is false. The post was at most shoulder high.

[2] Documents refer to the number on the clerk record to the Court of Appeals for the Eleventh Circuit.

Dempsey[3] placed the petitioner on the restraining bar. (*Id.*; *see also* Doc. 11, Exhibit 7, Incident Report, p. 2). Neither a disciplinary write-up, nor a hearing preceded the petitioner's placement on the restraining bar.

Captain David J. Wise later concluded that the other inmate was responsible for the altercation and ordered the petitioner released at 2:40 p.m. The Department of Corrections "Activity Log" for the restraining bar indicates that during the two hours the petitioner was restrained on the bar, he was offered water and a restroom break every fifteen minutes. (Doc. 11, Activity Log). Of the nine times he was offered water or a restroom break, the petitioner refused every offer of water and all but one offer of a restroom break. *Id.*

After being released from the restraining bar, a physical examination of the petitioner was conducted by an institution nurse at approximately 6:50 p.m. The examination revealed no signs of bruises, contusions, abrasions, lacerations, trauma, or illness. (Doc. 11, Hope Emergency/Treatment Record).

B. June 7, 1995, Incident

On June 7, 1995, the petitioner was involved in another altercation when, according to accounts provided by petitioner, a correctional officer "cursed [him] and grabbed [him] by the neck because [he] was sleeping on the bus on the way to a work site." (Doc. 32, ¶ 11). The petitioner avers that because he began choking, he

[3] Officer Dempsey is not named as a defendant in the instant case.

attempted to get the officer to release his grip. At that time, Officers Loggins, Kent, Jackson, Stephenson, and McGhee arrived and "subdued, handcuffed, placed [the petitioner] in leg irons, transported him back to Limestone, and put [him] on the hitching post."[4] (Doc. 32, ¶ 13).

According to the respondents, at approximately 10:30 a.m., Officer James Kent instructed the inmates on the bus to exit. After the order was repeated several times and five inmates, including the petitioner, failed to respond, Officer Loggins entered the bus and instructed the petitioner to get off. The petitioner responded to Loggins by saying, "Fuck you." (Doc. 17, Kent's Affidavit, pp. 1-2; Doc. 20, Loggins's Affidavit, p. 2). The petitioner also started towards Officer Loggins in an aggressive manner and reached out to grab Officer Loggins by the throat. *Id.* Officer Jackson stepped onto the bus and saw the petitioner trying to grab Officer Loggins around the neck. (Doc. 11, Ex. 3, Jackson's Affidavit, pp. 1-2). Jackson was trying to help Officer Loggins control the petitioner when they all tripped and fell off the bus. Officers Loggins, Kent, Mealer, and the petitioner fell on top of Jackson. (*Id.*, pp. 1-2). From approximately thirty yards away Officer Joseph Stephenson observed the officers and the petitioner fall off the bus and ordered the remainder of the inmate squad to sit on the ground. Officers Jackson, Loggins, and Kent handcuffed the petitioner. (Doc. 11, Ex. 5, Stephenson's Affidavit, pp. 1-2). Officer Pelzer was conducting security checks on the

[4] In his affidavit, defendant McClaran states that he placed the petitioner on the restraining bar. (Doc. 11, Ex. 2, p. I).

other inmate squads and arrived at the scene after the altercation. Officer Pelzer helped place leg irons on the petitioner and escorted the petitioner to the security vehicle. (Doc. 11; Pelzer's Affidavit, pp. 1-2). At about 10:50 a.m., the petitioner was taken to the health care unit at the institution.

According to the petitioner's affidavit, which is attached to the original complaint, when the petitioner returned to the institution, he was taken to the health care unit where he did not receive any treatment for his injuries. (Doc. 1, Petitioner's Affidavit, p. 1). According to the evidence, however, the petitioner was examined by Nurse Wilda Nichols at about 11:35 a.m. (Doc. 11, Medical Record). Nurse Nichols observed that the petitioner's speech was normal, he had a few scattered bumps on his left shoulder, a reddened area to the right shoulder, no bleeding, no knots on his head, he denied visual disturbances, and he ambulated well. Nurse Nichols noted that no treatment was needed at that time. *Id.* Because the petitioner disrupted the work squad and was not out working with the rest of his squad, he was then placed on the restraining bar.

The respondents in this case are Correctional Officer I Gene McClaran, Sergeant Mark Pelzer, and Lieutenant Jim Gates. (Doc. 26, p. 2). The petitioner does not allege these respondents failed to follow the state-wide regulation of using the restraining bar, including giving food, water, and bathroom breaks. The petitioner's allegation is that the regulation is unconstitutional. There is no

allegation that these respondents were not responsible for instituting the regulation or continuing the policy.

REASONS FOR DENYING THE PETITION

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY GRANTED JUDGMENT IN FAVOR OF THE RESPONDENTS BASED ON QUALIFIED IMMUNITY.

The respondents are entitled to qualified immunity in this case. Public officials are entitled to qualified immunity from damages if "their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would know." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), this Court clarified the appropriate standard by concluding that qualified immunity turns on the " 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken." *Id.* at 639 (citations omitted). This Court went on to note that, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, at 640.

The petitioner contends the Eleventh Circuit ignored the mandate in *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). *Lanier* and the instant case are diametrically different. *Lanier* involved a sitting state court judge who was criminally convicted under 18 U.S.C. §242 of violating the constitutional rights of five

women by sexually assaulting them. *Id.* Lanier assaulted these women in his judicial chambers including groping and orally raping some of these women. *Id.* at 261. In *Lanier*, this Court noted that general statements of law are not enough to impose liability. Liability may only be imposed "for deprivation of a constitutional right if, *but only if*, 'in light of pre-existing law the unlawfulness [under the Constitution is] apparent.' " *Id.* at 271-272 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)) (emphasis added); *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

The instant case involves handcuffing inmates who refused to work to a restraining bar, until either they agree to go back to work, or their work squad comes in for the day. The inmate is provided food, water, and bathroom breaks during this period. This practice was not apparently unlawful and simply does not rise to the level of the violation in *Lanier*. As noted by the Eleventh Circuit, "[I]n 1995 . . . there was no case law in this circuit with facts and legal analysis clear enough to serve as a bright-line rule establishing this violation, so prison guards cannot be financially responsible for their actions." *Hope v. Pelzer*, 240 F.3d 975, 982 (11th Cir. 2001).

A. Prior case holdings did not articulate statements of law that gave sufficient warning to defeat qualified immunity.

The petitioner asserts that general statements of law provide the necessary framework to prohibit the respondents' conduct at issue in the present case. The petitioner

further contends that the precise method of restraint need not be addressed to place the respondents on notice that their actions violated constitutional rights.

> In *Anderson*, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639, 107 S. Ct. 3034. "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640, 107 S. Ct. 3034 (citations omitted); *see also United States v. Lanier*, 520 U.S. 259, 270, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

Wilson v. Layne, 526 U.S. 603, 614-615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

As this Court recently stated, the inquiry into whether a right has been clearly established when making a determination on qualified immunity "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, ___U.S.___, 121 S. Ct. 2151, 2156, ___L. Ed. 2d___ (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

In *Lassiter v. Alabama A&M University*, 28 F.3d 1146 (11th Cir. 1994) (en banc), the Eleventh Circuit commented that "[t]he most common error we encounter, as a reviewing court, occurs on this point: Courts must not permit Plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights'." *Id.* at 1150.

In *Wilson v. Layne*, this Court determined the plaintiffs' Fourth Amendment rights had been violated by allowing the media to accompany officers to attempt an execution of an arrest warrant on their son. This Court held that the general protections of the Fourth Amendment were not enough to put the officers on notice that their actions violated the Fourth Amendment. *Wilson v. Layne*, 526 U.S. at 615. "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* On May 11, 1995, the day the petitioner was first handcuffed at shoulder level on the restraining bar at Limestone Correctional Facility, it was not clearly established that the use of the restraining bar was cruel and unusual punishment. At that time, it would have simply not been clear to a reasonable officer that securing a highly disruptive inmate to a restraining bar, where the inmate is given full access to food, water, and a bathroom, violated a constitutional right. The respondents, therefore, were properly granted qualified immunity.

B. State correctional officers are entitled to qualified immunity for handcuffing inmates to a restraining bar, in part, because the precise method and conditions of restraint were not addressed by prior rulings.

The petitioner contends *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Ort v. White*, 813 F.2d 318 (11th Cir. 1987); and *Williams v. Burton*, 943 F.2d 1572 (11th Cir. 1991) clearly establish limits on the use and duration of restraints. In analyzing whether past decisions, including *Gates* and *Ort* were sufficient to place correctional officials on notice, the Eleventh Circuit correctly stated:

> Hope argues that several of our cases, including *Gates* and *Ort*, established a bright-line rule against use of the hitching post. While we recognize that the inappropriateness of the hitching post could be inferred from these opinions, a bright-line rule for qualified immunity purposes 'is not to be found in abstracts – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances'. . . . We do not find the language in *Gates*, *Ort*, or any other Eleventh Circuit or Supreme Court opinion established that impermissible use of the hitching post constitutes cruel and unusual punishment clearly enough that a "reasonable official would understand that what he is doing violates that right."

Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001) (citation omitted).

In *Ort v. White*, 813 F.2d 318 (11th Cir. 1987) there is a similarity to the petitioner's case. Ort was a problem on

the work squad refusing to work and refusing to carry the water for the squad. Consequently, Ort was denied water for those periods of time he refused to work. The Eleventh Circuit held the action was a necessary coercive measure undertaken to obtain compliance with prison rules, i.e., carrying the water and working. *Id.* at 325.

Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991), *cert. denied*, 505 U.S. 1208, 112 S. Ct. 3002, 120 L. Ed. 2d 877 (1992) concerned an inmate who was placed in four-point restraints for over twenty-eight hours with his mouth taped shut part of the time. In that case, the Eleventh Circuit held this type of restraint did not violate the inmate's Eighth Amendment rights. *Id.* at 1576.

The reading of *Gates*, as noted by the Eleventh Circuit in *Hope*, "was even a more distinct case" and was a system wide attack on prison conditions. *Hope v. Pelzer*, 240 F.3d at 981. The only mention of behavior similar to that alleged in the various complaints is contained in a portion of a paragraph in this thirty-one (31) page opinion, which reads that corporal punishment such as:

> administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and cell for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods. . . . We have no difficulty in reaching the conclusion that these forms of punishment run

> afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.

Gates v. Collier, 501 F.2d at 1306. The opinion in *Gates* does not establish the law "in such concrete and factually defined context" that it would compel all reasonable correctional officers in the respondents' positions to conclude that their actions were unlawful. *Wilson v. Layne*, 526 U.S. at 615.

To require these respondents to draw this legal inference from these decisions would be an unrealistic expectation on these correctional officers. Such an expectation would require these correctional officers to draw inferences that even two federal magistrate judges, Judge Putnam and Judge McPherson, and two attorneys for parties of record were unable to draw after concerted legal research in the cases of *Whitson v. Lt. Gillikin*, CV-93-H-1517-NE (N.D. Ala. 1994) and *Hudson v. James*, CV-96-D-1266-N (M.D. Ala. 1998). In *Whitson*, the plaintiff was represented by counsel and he asserted claims that on July 6, 1993, he was denied needed medical attention and was handcuffed to a rail or bar for a period of eight hours without food, water, or the opportunity to use bathroom facilities. In this opinion, Magistrate Judge Putnam found the following facts:

> On July 6, 1993, plaintiff was assigned to work on a farm squad at the Limestone Correctional Facility, and shortly before 6:00 a.m. he was ordered to report to work. At that time, the plaintiff informed defendants Gilliken and Wise that he was suffering from a rash and was in need of medical attention. Sgt. Gates asked for

> the plaintiff's "stop-up" which is a medical authorization from the prison health care unit excusing prisoners from work due to health reasons. Plaintiff stated that he did not have one and that no one in the health care unit would give him a stop-up. Sgt. Gates told plaintiff that he could either go to work or "be placed on the security bar." Plaintiff refused to check out for his farm work unit, so defendant Gates escorted the plaintiff to a long metal bar to which he handcuffed the plaintiff. Plaintiff remained handcuffed at the bar or hitching rail from approximately 6:00 a.m. until approximately 2:00 p.m. that day. Although he had eaten breakfast that morning, he was offered no food or water or given any opportunities to use the bathroom facilities during the eight hour span. The daytime temperature ranged from 90 to 95 degrees. At approximately 2:00 p.m., the plaintiff was released from handcuffs and escorted by another officer to the prison health care unit for an examination. As a result of the handcuffing, the plaintiff suffered lacerations, pain, and swelling in his arms, although he was not treated by a physician at the health care unit.

(Doc. 37, Exhibit 3). In evaluating the plaintiff's claim arising under the Eighth Amendment, the court found this question "more problematic". Judge Putnam stated:

> He alleges that he was handcuffed to a bar or hitching post for eight hours without food, water, or the use of bathroom facilities in 90 to 95 degree heat. Plaintiff makes a strong argument that the practice of handcuffing recalcitrant prisoners to the security bar for eight hours is cruel and unusual punishment in that it amounts to wanton infliction of pain without

> penological justification. Because the defendants have pled the defense of qualified immunity, however, the court is not called upon to decide this difficult question because it is apparent that on July 6, 1993, there was no clearly established law identifying this practice as unconstitutional.

(Doc. 37, p. 31 [Exhibit 3]). In evaluating qualified immunity, Judge Putnam continued:

> [T]he court has made a diligent search of the case law to attempt to answer the question whether handcuffing, shackling, or chaining a prisoner to a fixed object for a period of several hours violated the Eighth Amendment prohibition against cruel and unusual punishment. It was with an eye toward this question that the court requested additional briefs from the parties, hoping to have their assistance in identifying any cases that might be said to clearly establish a rule of law in this area. Neither the court nor the parties have identified any cases, binding or otherwise in this circuit, in which it was found that the Eighth Amendment was violated by shackling or handcuffing a prisoner to a fixed object for a significant period of time due to the prisoner's refusal to work. Indeed the few cases that involve remotely analogous fact situations have upheld the use of physical restraints or coercive measures.

Id.

As Judge Ott stated when granting summary judgment to these respondents based on qualified immunity, "[t]hat the use of the restraining bar was not 'clearly established' as of the time of the defendants' conduct is amply demonstrated by the differing magistrate judge's

opinions cited by the parties dealing with the issue." (Doc. 45, pp. 20-21). The respondents were not put on notice by *Gates v. Collier*, *Ort v. White*, or *Williams v. Burton*. Consequently, the respondents were properly given qualified immunity for placing the petitioner on a restraining bar when he became disruptive to the work squad.

C. The longstanding Supreme Court decisions recognizing the unconstitutionality of the pillory and similar draconian devices did not give fair and clear warning that the use of handcuffs is the functional equivalent of the pillory and is similarly prohibited.

Petitioner seeks a ruling that the restraining bar, or "hitching post," is not distinct in structure, application, or effect from the pillory. The restraining bar used in the present case, unlike the pillory, does not restrain the head in any way, does not resemble the pillory in shape, is not made of wood, and utilizes handcuffs linked to a chain. It is a practical solution to the problem presented to prison guards when an inmate disrupts a work squad or refuses to work and cannot be returned to his cell.

A "pillory" is defined as "a wooden framework on a post, with holes for the head and hands." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1036-7 (3rd ed. 1993). Based on the petitioner's allegations, the restraining bar came to about shoulder height, and he was handcuffed to this bar. (Doc. 45, p. 8). Being placed on a restraining bar is obviously not equal in effect to being placed in a pillory because the restraining bar is an altogether different apparatus. With the restraining bar, for example, the

inmate has much more freedom of movement because his head is not locked in a wooden framework. Furthermore, unlike the pillory, if the inmate decides that he wants to return to work he will be released from the restraints. Unlike someone locked in a pillory, the inmate, in effect, holds the keys to his freedom from the restraint bar. Finally, unlike someone locked in a pillory, an inmate locked on the restraint bar is given access to water, food, and a bathroom.

Petitioner contends this Court found the pillory to be a violation of the Eighth Amendment in *Weems v. United States* because in dicta, this Court addressed the use of the pillory. *Weems v. United States*, 217 U.S. 349, 376 (1910). The Court of Appeals for the Eleventh Circuit has held that dicta cannot clearly establish the law for qualified immunity purposes. *Hamilton v. Cannon*, 80 F.3d 1525, 1530 (11th Cir. 1996); *see also Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmonson, J., dissenting) (even Supreme Court dicta cannot clearly establish the law for qualified immunity purposes), *adopted en banc*, 998 F.2d 923 (11th Cir. 1993); *Jones v. Evans*, 174 F.3d 1271, n.11 (11th Cir. 1999). Petitioner's reliance on dicta in *Weems* is therefore flawed because it does not clearly establish law.

Petitioner also includes *Ex Parte Wilson*, 114 U.S. 417, 5 S. Ct. 935, 29 L. Ed. 89 (1885) as authority regarding the issue of the pillory. *Wilson* concerns a habeas petition of a person convicted of passing a counterfeit United States bond. The petition was granted because the case had not been presented to a grand jury. *Id.* at 426. The opinion merely points out that the pillory was the punishment for perjury until the practice was abolished by acts of 1839.

Id. at 427. This opinion goes on to point out that imprisonment at hard labor was acceptable. *Id.* As with other cases the petitioner has cited, this case addresses the use of the pillory and has not put the respondents on notice that using the restraining bar violated any clearly established law.

The petitioner seeks to draw a comparison of the present case to two other cases this Court has decided, *Wilkerson v. Utah*, 99 U.S. 130, 9 Otto 130, 25 L. Ed. 345 (1878) and *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). These cases address the death penalty under the Eighth Amendment, and the facts of these cases in no way resemble the factual situation the present case presents. These cases could not give the respondents notice that their actions violated clearly established law because the facts of the present case are drastically different.

Finally, the petitioner cites the concurrence, not the majority opinion, of the United States Supreme Court case, *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2721, 33 L. Ed. 2d 346 (1972). *Furman* addresses whether a death sentence should be imposed in a capital murder case. This case also does not clearly establish law regarding whether it was improper for officials of the Alabama Department of Corrections to handcuff inmates to a horizontal bar after the inmates refused to work or were disruptive to the work squad. The restraining bar is simply not the same apparatus as the pillory. It would be impossible for Alabama Department of Corrections officials to reasonably conclude *Furman* provides clear guidance as to why the restraining bar is not an appropriate

tool to employ when attempting to encourage prisoners to go back to work.

D. Cases involving torture are not analogous to this case, making it unnecessary to overcome a claim of qualified immunity.

The petitioner contends that being handcuffed to a restraining bar, while being provided food, water, and bathroom breaks, is the equivalent of cases involving torture. The two cases the petitioner cites are not cases where the court found torture.

Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997), involves a person being arrested. In that case, after the subject was laid on the ground so he could be handcuffed, the police officer placed the subject's forearm in a position that caused the subject discomfort. After the subject complained, with a grunt and a blow, the officer caused the subject to suffer multiple fractures requiring surgery. Qualified immunity was denied in that case.

For a narrow exception to apply, "a plaintiff must show that 'the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.' " *Thomas v. Roberts*, 261 F.3d 1160, 1171 n.9 (11th Cir. 2001) (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)). The instant case does not meet this burden.

The other case the petitioner cites for the assertion torture is not required to overcome a claim of qualified immunity is *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir.

1996). *McMillian* involved an inmate who was incarcerated on death row in the Alabama State Prison System prior to his trial and conviction. *Id.* In that case, the Eleventh Circuit held that due to this Court's very clear prohibition of any pretrial punishment, it should have been obvious to a reasonable official not to place a person on death row prior to their conviction. *McMillian*, 88 F.3d at 1565. The Eleventh Circuit stated *McMillian v. Johnson* was an extraordinary case. *Id.* The respondents contend the facts in the instant case are not analogous to the facts in *McMillian v. Johnson*. In the present case, securing the petitioner to a restraining bar with access to food, water, and bathroom breaks was not such a blatant violation of the constitution as to eclipse the need for case law to put the respondents on notice.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

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No. 01-309

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed June 28, 2001
Certiorari Granted January 4, 2002
Amendment To Grant Of Certiorari January 29, 2002

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RELEVANT DOCKET ENTRIES

United States District Court
Northern District of Alabama
(Southern Division)

11/14/96	1	*Pro se* Complaint filed (referred to Magistrate Judge ~~Putnam~~)
12/31/96	4	Order requiring Defendants to file special report by 3/3/97
2/19/97	6	Motion by Plaintiff to supplement record to include photographs
2/25/97	7	Motion by Plaintiff to supplement
2/27/97	8	Motion by Defendants to extend time to answer by twenty (20) days
2/28/97	9	Order granting Defendants' motion to extend time to answer by twenty (20) days
3/24/97	11	Special report filed by Defendants
4/7/97	14	Order granting Plaintiff's motion to supplement record to include photographs
4/7/97	15	Order granting Plaintiff's motion to supplement
10/14/97	28	Order that Defendant's special report be treated as a motion for summary judgment
10/17/97	29	Notice of appearance for Plaintiff by attorney James Mendelsohn
10/17/97	30	Plaintiff's preliminary response to Defendant's special report
10/17/97	31	Plaintiff's motion for pro hac vice admission of attorney Craig Jones

11/3/97	32	Second affidavit of Plaintiff Larry Hope
11/3/97	33	Plaintiff's special report and brief in response to motion for summary judgment
11/5/97	35	Order granting Plaintiff's motion for Craig T. Jones to appear pro hac vice
12/27/97	42	Plaintiff's supplemental brief in opposition to summary judgment (deemed filed 12/27/97; docket entry not made until 3/8/00)
4/10/98	–	Docket modification; case referred to Magistrate Judge Ott
11/19/98	35	Notice of reassignment to District Court Judge Buttram
2/19/99	36	Order directing Defendants to file briefs in support of summary judgment within ten (10) days and giving Plaintiff ten (10) days to respond, after which motions to be deemed submitted
2/22/99	37	Defendant's response to order (in support of summary judgment)
3/1/99	43	Plaintiff's second supplemental brief in opposition to summary judgment (deemed filed 3/1/99; not docketed until 3/8/00)
11/26/99	38	Plaintiff's third supplemental brief in opposition to summary judgment
3/10/00	45	Magistrate Judge's Report and Recommendation that Defendants' special reports be treated as motions for summary judgment, that said motions be granted, that this action be dismissed with prejudice, and that any objections be filed within ten (10) days

3/20/00	46	Plaintiff's objection to Magistrate Judge's Report and Recommendation (with exhibits attached)
3/24/00	47	Memorandum opinion by District Court
3/24/00	48	Order in accordance with Memorandum Opinion and adopting Magistrate's Report and Recommendation that Defendant's special reports be treated as motions for summary judgment, that said motions be granted, and that this action be dismissed with prejudice with costs taxed against Plaintiff
4/24/00	49	Notice of appeal and payment of appeal cost

United States Court of Appeals
Eleventh Circuit

4/28/00	Appeal docketed
6/5/00	Appellant's brief and record excerpts filed
7/7/00	Appellees' brief filed
10/26/00	Oral argument conducted; court directs Appellees to file a copy of the Department of Corrections' hitching post policy (which was not in the District Court record)
10/30/00	Appellees file copy of hitching post policy (Administrative Regulation 429)
2/2/01	Opinion issued and judgment entered
2/22/01	Appellant files petition for rehearing en banc
5/7/01	Order denying petition for rehearing en banc
5/16/01	Mandate issued
7/30/00	Notice of petition for writ of certiorari

1983 FORM

Docket Number CV-96-B-2968-S

In the United States District Court
For the Northern District of Alabama

Larry Hope #181215

(Enter above the full name(s) of the plaintiff(s) in this action)

v

Mark Pelzer et. al,

(Enter above full name(s) of the defendant(s) in this action)

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court(s) dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes ( ) No ( )

B. If your answer to A is "yes", describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuit(s) on another piece of paper, using the same outline).

1. Parties to this previous lawsuit

Plaintiff(s): N/A

Defendant(s):

2. Court (If Federal Court, name the district; If State Court, name the county)_____

3. Docket Number N/A

4. Name of judge to whom case was assigned

_____

5. Disposition (for example; Was the case dismissed? Was it appealed? Is it still pending?

_____

N/A

6. Approximate date of filing lawsuit N/A

7. Approximate date of disposition _____

II. Place of present confinement William E. Donaldson Correctional Facility

A. Is there a prisoner grievance procedure in this institution?
Yes ( ) No (✓)

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?
Yes ( ) No (✓)

C. If you answer is YES:

1. What steps did you take? N/A

2. What was the result? N/A

D. If you answer is NO, explain why not? No Grievance Procedure

III. Parties

In item A below, place your name(s) in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of plaintiff(s) Larry Hope

100 Warrior Lane
Address Bessemer Alabama 35023

In Item B, below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants.

B. Defendant Sgt. Mark Pelzer
Is employed as Sergant Co II Correctional Officer
at Limestone Correctional Facility

C. Additional Defendants Officer McClarn COI Officer Kent COI Officer Jacksons COI Officer Laugan LOI Officer Stephen COI Officer MaGuee COI Lut. Gates

IV. Statement of Claim

State here, as briefly as possible, the FACTS of your case. Describe how each defendant is involved. Include, also, the names of other persons involved, dates and places. *Do not give any legal arguments or cite any cases or statutes*. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet, if necessary.

Please see: Attachment. Attached here to as follows: Next page.

Plaintiffs also desire (invoke 28 USC (2201) & (2202) Declaratory Judgment and Injunctive Relief.

This 42 U.S.C. section 1983 includes a cover letter for clerk

These Defendant's were acting under the color of state law and in violation of Plaintiff's Constitutional Rights etc.

Further Affiant says not.
For Judicial notice, please acknowledge this fact as follows: Plaintiff is now suffering emotional distress and injury he now on medication for facitating his pain and relaxation as prescribed by psychiatrist at this facility, Donaldson Corr.

V. Relief

State briefly ***exactly*** what you want the court to do for you. Make no legal arguments. Cite no cases or statutes

For injury etc as follows:
I, the plaintiff in the entire subject matter ask this Honorable Court to declare that the defendants violated plaintiff's Constitutional Rights and to award to plaintiff from each defendant monetary damages, punitive damages, and compensatory damages any just this court may deem proper. 2 Million dollar to be paid to Plaintiff by Defendant's

"I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
(date)

/s/ Larry Hope
_____
_____
_____
_____
_____
_____
_____
Signature(s)

EXHIBIT 1

Docket Number CV. 96-B-2968-S

AFFIDAVIT

STATE OF ALABAMA)
JEFFERSON COUNTY)

LARRY HOPE, being duly sworn, hereby deposes and says:

I am incarcerated at Donaldson Correctional Facility. I was previously assigned to the Limestone Correctional Facility chain gaing, where I was beaten and twice put on the hitching post.

On May 11, 1995, inmate Tony Perkins and I were having a verbal disagreement while out on the chain gang. Officer McClaran saw us and mistakenly concluded that we were about to assault one another. As a result, he ordered me put on the hitching post for being "disruptive to the work squad."

On June 7, 1995, I went to work along the highway on the chain gang. I took a nap on the bus to the work site because I was extremely tired. When the bus arrived, Officer Laugan stated, "Get you ass off the bus." When I told him that my name was Larry Hope, he stated "I don't give a damn what your name is, get off the bus." He then began choking me.

Because the choking made me unable to breath, I grabbed the officer's neck in retaliation. Officer Laugan then threw his weight off the bus. We both fell off the bus and onto the ground. He landed on top of me and continued choking me.

Officers Kent, Jacksons, Stephen and MaGuee then came and kicked and punched me. As they finally snatched me off the ground, Officer Laugan slammed my head against the bus.

They took me to the health care unit, but I did not receive any treatment for my injuries there. A copy of my medical report is attached.

The guards then put me on the hitching post a second time. I was wearing a T-shirt, and an officer said "take that rag off of him. I have shit I need to clean off the van." They made me take off my shirt and remain shirtless all day while the sum beamed down and burned my skin.

Because I am just slightly taller than the hitching post itself, my arms grew tired from being handcuffed so high. I tried to swing them to improve my circulation, but this caused the cuffs to cut into me. By the time I got off the rail, my wrists were swollen and bruised.

I was very thirsty while on the post. But instead of giving me water, a guard cruelly taunted me about my thirst. He first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground. This was very frustrating for me.

/s/ Larry Hope
Larry Hope

Sworn before me this the 26 day of March, 1996
/s/ [Illegible]
Notary Public
My Commission Expires:
11-23-96

[The Following Notation was Handwritten – Please Attention the Following:

"Affidavit is being resubmitted to the United States" District Court for the Northern District of Alabama as previously submitted to Southern Poverty Law Center dated March 26, 1996, and is (now) being submitted as ground(s) of the Plaintiff's Civil Action Suit i.e. etc.

L.H. re-initialed date: 11-1-96

L.H.

Plaintiff,

/s/ Larry Hope 181215
Signature of Affiant, Plaintiff]

———

[illegible]ARTMENT OF CORREC[illegible]

EMERGENCY/ _____ TREATMENT RECORD
(OTHER)

DATE 5/11/95 TIME 1550 AM (PM)

FACILITY LCF ☐ SIR ☐ POL ☐ ESCAPEE ☐ _____

☐ EMERGENCY ☒ OTHER

ALLERGIES NKA

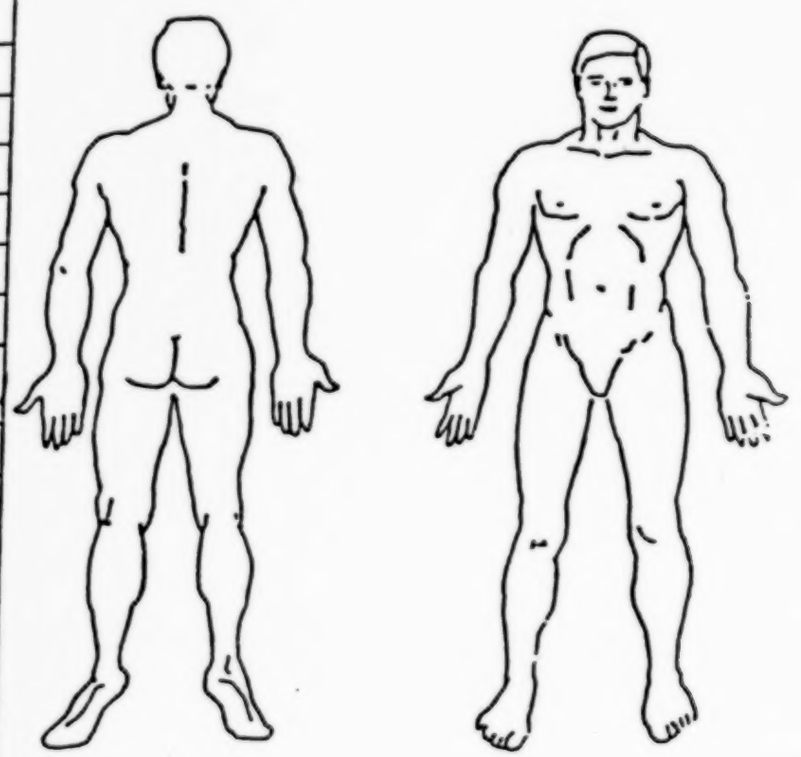
CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 98° (ORAL) RECTAL RESP. 18 PULSE 72 B/P 130/50 RECHECK IF SYSTOLIC <100> 50 _____

NATURE OF INJURY OR ILLNESS

5" I was cuffed to a pole 'til now

ABRASION/// CONTUSION # BURN XX XX FRACTURE Z Z LACERATION/ SUTURES



PHYSICAL EXAMINATION

5" No bruises contusions fractures or lacerations noted No S/S trauma to head

☒ No S/S trauma to head

ORDERS, MEDICATION, etc.

P Pt was/ated. cuffed on WH & MAC indicated non-compliance Inmate transfer canceled due unfortunately of taking WH & the facilities involved Pt left @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

Keep up for sick call as needed

RELEASE/TRANSFER DATE 5/11/95 TIME 1655 AM (PM)

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ POOR ☐ FAIR ☐ CRITICAL

NURSE'S SIGNATURE [illegible] DATE 5/11/95

PHYSICIAN'S SIGNATURE DATE

CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) [illegible] AGE DATE OF BIRTH [illegible] R/S [illegible] AIS # [illegible]

EXHIBIT 2

12

BEST AVAILABLE COPY

DEPARTMENT OF CORREC. IS

EMERGENCY/ Non scheduled (OTHER) TREATMENT RECORD

DATE 6-7-95 TIME 11:45 AM PM

FACILITY Dorm 34

☐ SIR ☐ PDL ☐ ESCAPEE ☐

☐ EMERGENCY ☒ OTHER

ALLERGIES N K A

CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 99.6 ORAL / RECTAL RESP. 18 PULSE 80 B/P 132/78 RECHECK IF SYSTOLIC <100> 50

NATURE OF INJURY OR ILLNESS

S "One of them Djeiss jumped on me"

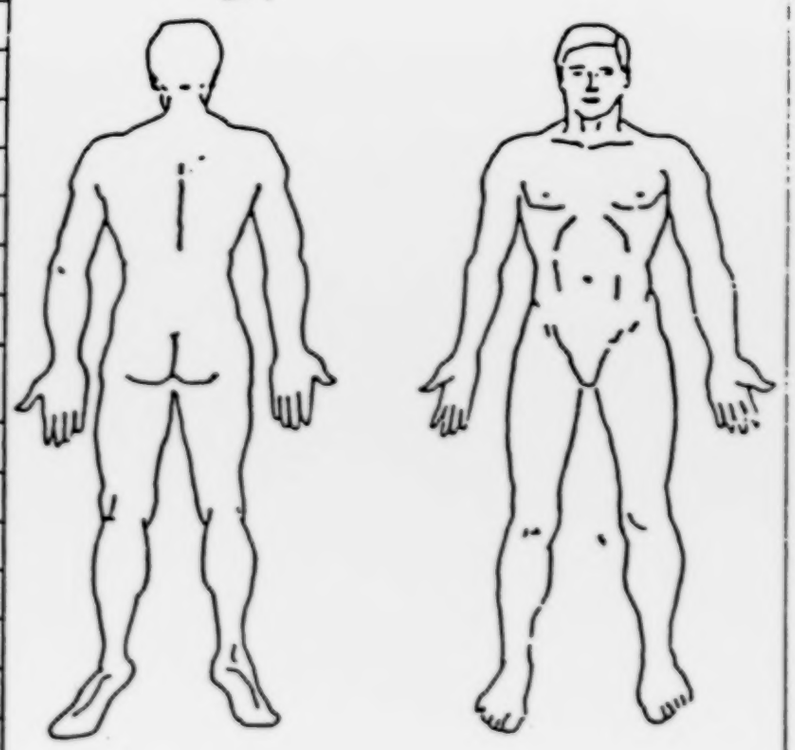
O Speech normal - Fell scattered bruises on left upper Rt. Odd and Rt. Shoulder

PHYSICAL EXAMINATION

Area to right shoulder. No bleeding at this time. No knots on head. Denies any visual disturbances. Ambulates well.

A. minor head and neck trauma to right shoulder

ABRASION/// | CONTUSION // | BURN XX XX | FRACTURE Z Z | LACERATION/ SUTURES



ORDERS, MEDICATION, etc.

P Release to D.O.C. no treatment indicated @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

RELEASE/TRANSFER DATE 6/7/95 TIME 11:45 AM PM

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ POOR ☐ FAIR ☐ CRITICAL

NURSE'S SIGNATURE Wilda Archuleta DATE 6-7-95

PHYSICIAN'S SIGNATURE DATE

CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) Hugo Dan

AGE 38 DATE OF BIRTH 7/5/57 R/S R/R AIS # 181215

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE,	)	
	)	**CIVIL ACTION NO.**
Plaintiff,	)	**96-B-2968-S**
vs.	)	
	)	
MARK PELZER, et al.,	)	
	)	
Defendants.	)	

SPECIAL REPORT

Come now the Defendants, Pelzer, McClaran, Jackson, MeGee, Stepheson, and Gates, in the above-styled cause, by and through undersigned counsel and hereby files his Special Report as follows:

PLAINTIFF'S ALLEGATIONS

Plaintiff, alleges his constitutional rights have been violated in the following manner:

1. Defendant McClaran handcuffed him to a "hitching post" on May 11, 1995, in violation of the Eighth Amendment.

2. On June 7, 1995, Defendants violated his Eighth Amendment by using excessive force and by placing him on the "hitching post."

DEFENSES

The Defendants allege that Inmate Hope fails to state a cause of action against them for which relief can be granted.

Defendants are entitled to qualified good faith immunity from Plaintiff's complain under 42 U.S.C. 1983.

Defendants are entitled to absolute immunity for all claims against him in his official capacity.

Defendants assert the doctrine of res judicata and/or collateral estoppel and contend he is barred from asserting this claim wherein he asserts monetary damages.

DEFENDANTS

Mark Pelzer, Sergeant at Limestone Correctional Facility (LCF)

Gene McClaran, Correctional Officer at LCF

Greg Jackson, Correctional Officer at LCF

Gary McGee, Correctional Officer at LCF

Joseph Stevenson, Correctional Officer at LCF

Jim Gates, Lieutenant at LCF

STATEMENT OF THE FACTS

On May 11, 1995, Officer McClaran was supervising a squad of inmates who were working along side the roadway. At approximately 11:40 a.m., the plaintiff and another inmates caused a disruption of the work squad by being involved in a verbal confrontation. In addition,

the plaintiff raised a tool towards the other inmate. As a result of this conduct, the plaintiff and the other inmate were removed from the work squad, taken back to the facility and placed the on the restraining bar at approximately 12:30 p.m. While on the restraining bar, the inmates were monitored by a correctional officer who afforded them water and restroom breaks. At approximately 2:30 p.m., the plaintiff was released from the restraining bar per orders of Captain Wise. (see Activity Log attached to Exhibit #7) At approximately 6:50 p.m., the plaintiff was seen by the medical staff. The results of the medical examination indicate: "no bruises, contusions, abrasions, or lacerations noted, no s/s [signs/symptoms] trauma or illness" and the plaintiff was released in satisfactory condition to the officers. (see Emergency/Treatment Record attached to Exhibit #7) Officer McClaren's involvement in this incident was in determining the actions were disruptive to the work squad, that the inmates should be removed from the work squad and in the initial reporting of the incident which led the inmates to be placed on the restraining bar. (see Exhibit #7, Incident Report and Exhibit #2 Affidavit of Officer McClaren)

On June 7, 1995, at 10:30 a.m., Correctional Officers were placing restraining devices on those inmates who were assigned to the chain gang. During this process, Officer Jackson heard Officer Loggins and the plaintiff having a loud verbal confrontation while inside the bus. Officer Jackson entered the bus in order to assist Officer Loggins. Upon entering the bus, Officer Jackson observed the plaintiff trying to grab Officer Loggins by the head or neck. While trying to bring Inmate Hope under control,

Officers Loggins, Jackson and Inmate Hope fell out of the bus. Inmate Hope fell on top of Officer Jackson. At this time Officers Loggins, Jackson and Kent handcuffed Inmate Hope. (Exhibit #3, Affidavit of Officer Jackson) Sgt. Pelzer assisted in the placing of leg irons on the plaintiff and escorting him to the vehicle which would provide transportation back to the facility for the disruptive behavior on the work squad. (Exhibit #1, Affidavit of Sgt. Pelzer) When examined by the medical staff at approximately 11:15 a.m., Inmate Hope's only injury was a minor reddened area to the right shoulder. (Exhibit #8, Emergency/Treatment Record)

ARGUMENTS

RES JUDICATA AND COLLATERAL ESTOPPEL

The Eleventh Circuit has held that "res judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the 'operative nucleaus of fact', *NAACP v. Hunt* 891 F.2d 1555, 1560 (11th cir. 1990). A court must look to the factual issues to be resolved in the second cause of action. Moreover, privity exists where a party to the origianl suit is "so closely aligned to a nonparty's interest as to be his virtual representative". *United Merchants & Mfrs. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987). In this case, the actions are the same – an inmate is attacking the use of the restraining bar on Eighth Amendment grounds. In fact, the plaintiff is a class member in the case styled *Austin et al., v. James, et al.*, Case No. 95-T-637-N, presently pending in the United States District Court for the Middle District of Alabama. In addition, the

plaintiff testified concerning the identical allegations which are the subject matter of this claim. The Defendants contend the Plaintiff is barred from bringing a successive claim in which he seeks monetary damages, after being certified as a class member in a suit which sought only injunctive and declaratory relief.

EXCESSIVE USE OF FORCE CLAIM

Inmate Hope claims that officers used excessive force against him on June 7, 1995. Clearly, the actions taken by the officers were to bring Inmate Hope under control after a loud verbal confrontation occurred in a bus containing other inmates. The Defendants state that "[c]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823, 94 S.Ct. 2800, 41 L.Ed.2d 495, 502 (1974)

> [t]he management by a few guards of large numbers of prisoner, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.

Johnson v. Glick, 481 F.2d 1028, 1033 *cert denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

Whenever prison officials are accused of excessive force, the core inquiry is set forth in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986): whether the force was applied in a good-faith effort to maintain or

restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995, 117 L.Ed.2d 156, 165-166 (1992). Liability requires a showing by the plaintiff that there was no plausible basis for the official belief in the necessity for using the degree of force employed. *Whitley v. Albers*, 475 U.S. at 323 89 L.Ed.2d at 263. The Eighth Amendment's prohibition against cruel and unusual punishment is triggered when an inmate is subjected to "unnecessary and wanton infliction of paid". *Bennett v. Parker*, 898 F.2d 1530, 1532 (11th Cir. 1990).

Several factors identified in *Whitley* control a court's decision on whether a prison guard has used excessive force: (1) the need for the application of force; (2) the relationship between the need and amount of force used; and (3) the extent of the injury inflicted upon the prisoner. *Whitely*, 465 U.S. at 321, 106 S.Ct. at 1085.

Furthermore, the U.S. Supreme Court has clarified the deliberate indifference standard as the proper standard of review for Eighth Amendment claims filed pursuant to 42 U.S.C. § 1983. *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). The Court held that a prisoner claiming that cruel and unusual punishment had been administered against him must show a culpable state of mind on the part of the correctional officers. Accordingly, an intent requirement is implicit for an Eighth Amendment claim. The Defendants submit that not only is there a lack of an objective violation of the Eighth Amendment, but the subjective element – the intent requirement – has not even been pled.

In this case, the Plaintiff creating a security hazard, attacking Officer Loggins. The officers responded to the aggressive acts of the plaintiff in an attempt to subdue him and remove him from the area and were reasonable given the eligent circumstance of the situation. Thus, Inmate Hope has failed to establish a claim for cruel and unusual punishment.

HITCHING POST CLAIMS

The Eighth Amendment's prohibition of cruel and unusual punishment is triggered when a prisoner is subjected to an "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The U.S. Supreme Court has clarified the deliberate indifference standard as the proper standard of review for Eighth Amendment claims filed pursuant to 42 U.S.C. § 1983. *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). The Court held that a prisoner claiming that the conditions of his confinement violate the Eighth Amendment must show a culpable state of mind on the part of prison officials. Accordingly, an intent requirement is implicit for an Eighth Amendment claim. Defendants submit that not only is there a lack of an objective violation of the Eighth Amendment, but the subjective element – the intent requirement – has not even been specifically pled. Thus, the plaintiff has failed to establish a violation of his constitutional rights.

The Courts will give great deference to prison officials in decisions relating to internal prison security. *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). Prison officials "should

be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve order and discipline and maintain institutional security." *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). The Defendants policy and actions in placing the plaintiff on the restraining bar was necessary to eliminate the possibility of disruption of the work squad and to discourage other inmates from exhibiting similar conduct. *Clearly,* the plaintiff was placed on the restraining bar to maintain order on the work squad, and not sadistically for the purpose of causing harm. See *Ort v. White,* 813 F.2d 318 (11th Cir. 1987), *Williams v. Burton,* 943 F.2d 1572 (11th Cir. 1991). Furthermore, the utilization of a restraining bar has been upheld as justified by the Northern District Court of Alabama *Jeffery Lane v. Harry Findley, et al.,* Mag. Op. CV-93-C-1741-S, (N.D. Ala. Aug. 4, 1994) (see attached)

For these reasons, the Defendants contend the successive claim is barred, requests the Honorable Court to note the assertion of the affirmative defense of qualified immunity and as there are no issues of material fact, pursuant to F.R.C.P. 56(b), request that their motion for summary Judgment be granted.

Respectfully submitted,

/s/ Andrew W. Redd KS
ANDREW W. REDD
GENERAL COUNSEL

/s/ Ellen Leonard KS
ELLEN LEONARD
ASSISTANT GENERAL COUNSEL

/s/ Kim Thomas
KIM THOMAS
ASSISTANT GENERAL COUNSEL

ADDRESS OF COUNSEL:

Alabama Department of Corrections
Legal Division
P.O. Box 301501
Montgomery, Alabama 36130
(334) 353-3885

[Certificate Of Service Omitted In Printing]

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO.
MARK PELZER, ET AL.,	)	CV96-B-2968-S
Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Mark Pelzer, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Mark Pelzer, and I am presently employed as a Correctional Officer II, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

On June 7, 1995, I was the siderider for Lieutenant Jim Gates. My duties as siderider had me at another location. There were other squads working and I was conducting security checks on those squads.

I was not present during the alleged incident. I arrived at the scene after the altercation occurred. My only involvement was to place leg irons on Inmate Hope and escort him to the security vehicle for transport to Limestone Correctional Facility.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Mark A. Pelzer COII
MARK PELZER

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 20 DAY OF March, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. CV96-B-2968-S
GENE McCLARAN, ET AL., Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Gene McClaran, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Gene McClaran, and I am presently employed as a Correctional Officer I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

I did place Inmate Hope on the Restraining Bar and that was my only involvement with him. No force was used against Inmate Hope during this process.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have

not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Gene McClaran
GENE MCCLARAN

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 27 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. CV96-B-2968-S
GREGORY JACKSON, ET AL., Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Gregory Jackson, who being

known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Gregory Jackson, and I am presently employed as a Correctional Officer I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

On June 7, 1995, I, Officer Gregory Jackson, was assigned to the Chain Gang as a Squad Officer. At approximately 10:30 a.m., I heard Officer Ted Loggins and Inmate Larry Hope, B/181215, having a loud verbal confrontation on the bus. I stepped up on the bus. Inmate Hope was trying to grab Officer Loggins around the head or neck area. I assisted Officer Loggins with Inmate Hope when all of us tripped and fell off the bus. Inmate Hope, Officer Loggins, Officer Kent and Officer Mealer fell on top of me while trying to restrain Inmate Hope. At this time, Officer Loggins, Officer James Kent and myself handcuffed Inmate Hope. I did not kick nor did I strike Inmate Hope at any time. Inmate Hope was escorted to Lieutenant Jim Gates' station wagon and placed in it to be transported back to Limestone Correctional Facility.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Gregory Jackson COI
GREGORY JACKSON

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 29 DAY OF March, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO.
GARY MCGEE, ET AL.,	)	CV96-B-2968-S
Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Gary McGee, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Gary McGee, and I am presently employed as a Correctional Officer I, with the Alabama

Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

I have never kicked or punched Inmate Larry Hope. I have never handcuffed Inmate Hope to the security rail. I was not working on the day the alleged incident occurred. I have no knowledge of the alleged incident.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Gary McGee COI
GARY MCGEE

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 24 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. CV96-B-2968-S
JOSEPH STEPHENSON, ET AL., Defendants.	)	

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Joseph Stephenson, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Joseph Stephenson, and I am presently employed as a Correctional Officer I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

On June 7, 1995, I, Officer Joseph Stephenson, was assigned to the Chain Gang as a side rider to provide extra security. At approximately 10:30 a.m., I observed Officer Ted Loggins tumble off the bus to the ground with an inmate, later identified as Larry Hope, B/181215. At that time, I was approximately 35 yards away and was armed with a shotgun and a .38 caliber pistol, providing security.

I ordered the squad of inmates to sit on the ground. As I turned to look back at the area of the confrontation, I observed Officers James Kent and Greg Jackson assisting Officer Loggins in restraining Inmate Hope. Inmate Hope was then escorted to Lieutenant Jim Gates' station wagon and placed in it to be transported back to Limestone Correctional Facility. At no time did I approach the Officers or the inmate during the confrontation or after the confrontation. I was armed and I was holding security on the squad to prevent a possible escape attempt. I did not kick nor did I strike Inmate Hope at any time.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Joseph Stephenson COI
JOSEPH STEPHENSON

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 24 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

LARRY HOPE, Plaintiff, VS. JIM GATES, ET AL., Defendants.	)	CIVIL ACTION NO. CV96-B-2968-S

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for said County and State of Alabama at large, personally appeared one Jim Gates, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is Jim Gates, and I am presently employed as a Correctional Officer Supervisor I, with the Alabama Department of Corrections, Limestone Correctional Facility, Capshaw, Alabama. I am over nineteen (19) years of age.

My name is not contained in the contents of the Complaint. There are no specific allegations in the Complaint for my response. There are no specific allegations against me noted in the Complaint.

To my knowledge, the above related facts are the entirety of my involvement with Inmate Hope concerning the allegations on which his complaint is based. I have

not violated any of Inmate Larry Hope's Constitutional Rights.

/s/ Jim Gates
JIM GATES

STATE OF ALABAMA)
LIMESTONE COUNTY)

SWORN TO AND SUBSCRIBED BEFORE ME AND GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS THE 24 DAY OF January, 1997.

[SEAL] /s/ Dianne R. Sisk
NOTARY PUBLIC

My commission expires 6-9-98.

EXHIBIT 7

STATE OF ALABAMA
BOARD OF CORRECTIONS
INSTITUTIONAL INCIDENT REPORT

1. Institution: Limestone Correctional Facility
2. Date: May 11, 1995
3. Time: 11:40 A.M.
4. Incident Number: LCF-95-1229
5. Location Where Incident Occurred: Interstate 65 north of mile marker 360
6. Type of Incident: Inmate Disagreement
7. Time Incident Reported: 11:41 A.M.

8. Who Received Report: /s/ Mark A. Pelzer COI
Sergeant Mark Pelzer

9. Victim:

a. N/A (Type Full Name) No. _____

b. _____ (Type Full Name) No. _____

10. Suspects:

a. Larry Hope No. B/181215

b. Tony Perkins No. W/181331

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

11. Witnesses:

a. N/A No. _____

b. _____ No. _____

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

f. _____ No. _____

g. _____ No. _____

Physical Evidence:

12. Type of Evidence: N/A

_____

13. Description of Evidence: N/A

_____

_____

14. Chain of Evidence: N/A

a. _____

b. _____

c. _____

d. _____

15. Narrative Summary: On May 11, 1995, at approximately 11:40 A.M., Officer Gene McClaran was assigned to chain gang #1. Officer McClaran's responsibilities included monitoring the squad on Interstate 65 just north of mile marker #360. Officer McClaran observed Inmates Larry Hope, B/181215 and Tony Perkins, W/181331 having a verbal disagreement. Officer McClaran attempted to intervene by giving a loud verbal statement to stop! Inmate Hope raised the swing blade he was working with and drew back with intentions of striking Inmate Perkins. Officer McClaran racked the slide bolt closed and instructed all the squad to get on the ground. Officer McClaran notified Sergeant Mark Pelzer of the situation. Officer McClaran's squad remained on the ground except for Inmates Hope and Perkins. Officer McClaran again instructed both inmates to get on the ground. Inmate Hope stated to Officer McClaran "fuck you". Sergeant Pelzer arrived and instructed both inmates to the ground, and they complied. Sergeant Pelzer removed Inmates Hope and Perkins from Officer McClaran's squad placing them in the Institutional transfer van. Officer Brian

Waters escorted Inmates Hope and Perkins to Limestone Correctional Facility at approximately 12:00 p.m.

At approximately 12:20 p.m. Inmates Hope and Perkins were placed on the Institutional security bar by Officer Keith Gates and Mark Dempsey.

At approximately 5:06 p.m. Officer McClaran released Inmate Perkins from the security bar and Nurse Paul Thornhill performed a body chart on Inmate Perkins. Officer McClaran escorted Inmate Perkins to the back gate of the Institution and was checked in by Sergeant Lloyd Wallace. Officer McClaran was notified by Sergeant Pelzer that Inmate Hope was released from the security bar at approximately 2:40 p.m. by Officer Keith Gates per Captain David J. Wise. A body chart was performed on Inmate Hope by Nurse Janet Gilliland at approximately 6:55 p.m. and released to his assigned dormitory. Inmate Hope and Perkins were reassigned to Squad #1. A peace agreement was signed by Inmates Hope and Perkins.

See attached: Body Charts
Activity Logs
Peace Agreements

/s/ Gene McClaran, COI
Gene McClaran, COI

PARTMENT OF CORREC ONS

EMERGENCY/ Non Scheduled TREATMENT RECORD
(OTHER)

DATE 11/11/15 TIME 1106 AM PM | FACILITY LCF ☐ SIR ☐ POL ☐ ESCAPEE ☐ _____ | ☐ EMERGENCY ☑ OTHER

ALLERGIES —

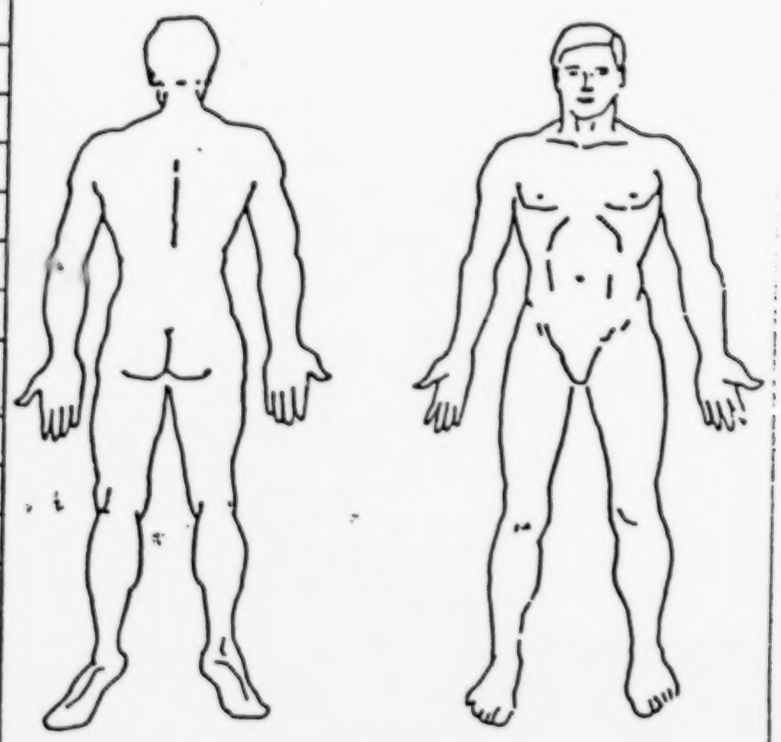
CONDITION ON ADMISSION ☑ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 97.6 ORAL RECTAL RESP. 16 PULSE 74 B/P 126/72 RECHECK IF SYSTOLIC <100 >50 _____

NATURE OF INJURY OR ILLNESS

S: "Don't Dr

ABRASION/// | CONTUSION // | BURN ¤ ¤ | FRACTURE Z Z | LACERATION/ SUTURES



PHYSICAL EXAMINATION

O: No s/sx of acute distress
No s/sx of contagious/transmissible illness

ORDERS, MEDICATION, etc.

A: No acute injury/illness

P: No Tx (a) this visit

DIAGNOSIS

INSTRUCTIONS TO PATIENT

F/u sick call as needed

RELEASE/TRANSFER DATE 11/11/15 TIME 1115 AM PM | RELEASE/TRANSFERRED TO ☐ DOC ☐ AMBULANCE ☐ | CONDITION ON DISCHARGE ☑ SATISFACTORY ☐ FAIR ☐ POOR ☐ CRITICAL

NURSE'S SIGNATURE [redacted] DATE 11/11/15 | PHYSICIAN'S SIGNATURE | DATE | CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) [redacted] | AGE 17 | DATE OF BIRTH 1/2/98 | R/S | AIS #

[illegible] DEPARTMENT OF CORREC[illegible]

EMERGENCY/_____ (OTHER) TREATMENT RECORD

DATE 5/11/95 TIME 1150 AM (PM)

FACILITY [illegible] ☐ SIR ☐ POL ☐ ESCAPEE ☐ _____

☐ EMERGENCY ☒ OTHER

ALLERGIES NKA

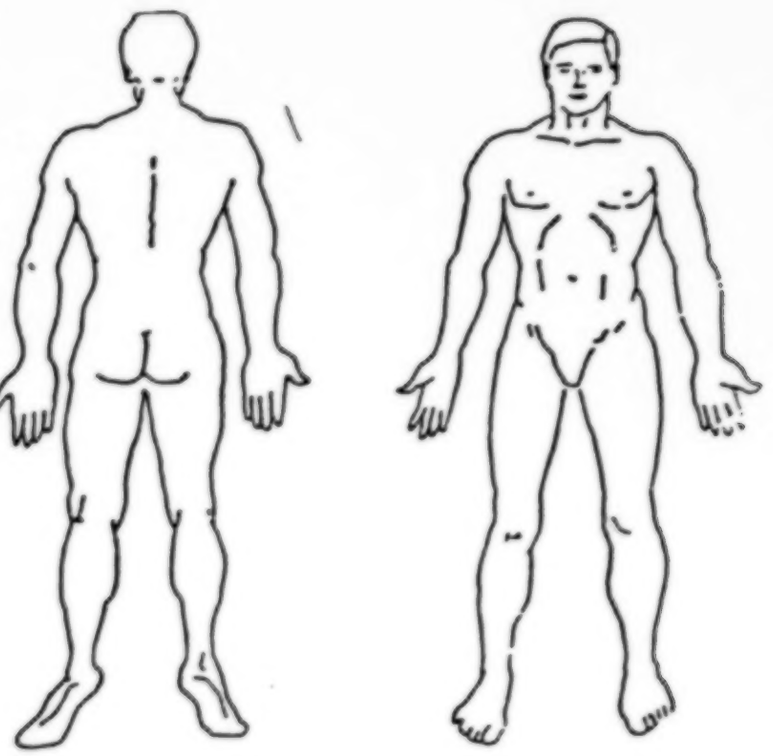
CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 98.6 (ORAL) RECTAL RESP. 18 PULSE 72 B/P 130/50 RECHECK IF SYSTOLIC <100> 50 _____

NATURE OF INJURY OR ILLNESS

ABRASION// | CONTUSION # | BURN xx xx | FRACTURE ZZ | LACERATION/ SUTURES

S "I was stuffed to a pole today"



PHYSICAL EXAMINATION

S No bruises contusions abrasions or lacerations noted No S/S trauma to Head

O No S/S trauma to Head

ORDERS, MEDICATION, etc.

P Pt was alerted, oriented to WH & MAC educated to compliance with routine strategies counseled about importance of taking WH & the consequences involved

Pt left @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT Sign up for sick call as needed

RELEASE/TRANSFER DATE 5/11/95 TIME 1155 AM (PM)

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐ _____

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ FAIR ☐ POOR ☐ CRITICAL

NURSE'S SIGNATURE [illegible] DATE 5/11/95

PHYSICIAN'S SIGNATURE _____ DATE _____ CONSULTATION _____

PATIENT'S NAME (LAST, FIRST, MIDDLE) [illegible] AGE _____ DATE OF BIRTH [illegible] R/S [illegible] AIS # [illegible]

INSTITUTION: LIMESTONE CORP. DATE: 5-11-95

ACTIVITY LOG
**INMATES PLACED ON RESTRAINING BAR

Inmate's Name: LARRY HOPE AIS#: P/181250

Time Inmate Restrained: _____ (AM) 1230/pm [(PM)]

Reason For Restraint:

Refusing to Work — Fight _____
Disruptive to Work Squad (Be Specific) _____
a. Refusal to Walk in Prescribed Manner _____
b. Refusal to Carry a Tool to Job Site _____
c. Other (Be Specific) _____

_____

_____

Event/Activity Codes:

1. Meal Accepted
2. Meal Rejected
3. Fluid/Water Accepted
4. Fluid/Water Rejected
5. Restroom Break Accepted
6. Restroom Break Rejected
7. Prescribed Medications Accepted
8. Prescribed Medications Rejected
9. Checked by Health Care Unit
10. Released From Restraining Bar

RECORD EVENT/ACTIVITY CODE
AND INITIAL AT ENTRY

7:00 am	X	12:15 pm	X
7:15 am	X	12:30 pm	4,6
7:30 am	X	12:45 pm	4,6
7:45 am	X	1:00 pm	4,6
8:00 am	X	1:15 pm	4,6
8:15 am	X	1:30 pm	4,6
8:30 am	X	1:45 pm	4,5
8:45 am	X	2:00 pm	4,6
9:00 am	X	2:15 pm	4,6 D.B.
9:15 am	X	2:30 pm	4,6 D.B.
9:30 am	X	2:45 pm	
9:45 am	X	3:00 pm	
10:00 am	X	3:15 pm	
10:15 am	X	3:30 pm	
10:30 am	X	3:45 pm	
10:45 am	X	4:00 pm	
11:00 am	X	4:15 pm	
11:15 am	X	4:30 pm	
11:30 am	X	4:45 pm	
11:45 am	X	5:00 pm	
12:00 noon	X		

Comments: Released at 9:30 PM Per Capt. Wise

**Restraining Bar to be used only during daylight hours.

Annex A to AR 119

INSTITUTION: Limestone Corp. DATE: 5-11-95

ACTIVITY LOG
**INMATES PLACED ON RESTRAINING BAR

Inmate's Name: Tony Perkins AIS#: W/151331

Time Inmate Restrained: _____ (AM) 1230/pm [(PM)]

Reason For Restraint:

Refusing to Work	Fight
Disruptive to Work Squad (Be Specific)	
a. Refusal to Walk in Prescribed Manner	
b. Refusal to Carry a Tool to Job Site	
c. Other (Be Specific)	

Event/Activity Codes:

1. Meal Accepted
2. Meal Rejected
3. Fluid/Water Accepted
4. Fluid/Water Rejected
5. Restroom Break Accepted
6. Restroom Break Rejected
7. Prescribed Medications Accepted
8. Prescribed Medications Rejected
9. Checked by Health Care Unit
10. Released From Restraining Bar

RECORD EVENT/ACTIVITY CODE
AND INITIAL AT ENTRY

7:00 am	X	12:15 pm	X
7:15 am	X	12:30 pm	4,6
7:30 am	X	12:45 pm	4,6
7:45 am	X	1:00 pm	4,6
8:00 am	X	1:15 pm	4,6
8:15 am	X	1:30 pm	4,6
8:30 am	X	1:45 pm	4,5
8:45 am	X	2:00 pm	4,6
9:00 am	X	2:15 pm	4,6 D.B.
9:15 am	X	2:30 pm	4,6 D.B.
9:30 am	X	2:45 pm	4,6 D.B.
9:45 am	X	3:00 pm	4,6 D.B.
10:00 am	X	3:15 pm	4,6 D.B.
10:15 am	X	3:30 pm	4,6 D.B.
10:30 am	X	3:45 pm	4,6 D.B.
10:45 am	X	4:00 pm	3,6 D.B.
11:00 am	X	4:15 pm	4,6 D.B.
11:15 am	X	4:30 pm	4,6 D.B.
11:30 am	X	4:45 pm	4,6 D.B.
11:45 am	X	5:00 pm	10 D.B.
12:00 noon	X		

Comments: Released by Sgt Pelger at 5:00 PM D.B.

**Restraining Bar to be used only during daylight hours.

Annex A to AR 129

BEST AVAILABLE COPY

DEPARTMENT OF CORREC. IS

EMERGENCY/ Non scheduled (OTHER) TREATMENT RECORD

DEFENDANT'S EXHIBIT #8

DATE	TIME	FACILITY	
6-7-95	11 AM PM	Dorm 34	☐ EMERGENCY ☒ OTHER
		☐ SIR ☐ POL ☐ ESCAPEE ☐	

ALLERGIES N K A

CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 99.6 ORAL / RECTAL RESP. 18 PULSE 80 B/P 132 / 74 RECHECK IF SYSTOLIC <100 > 50

NATURE OF INJURY OR ILLNESS

S "One of them officers jumped on me" LD

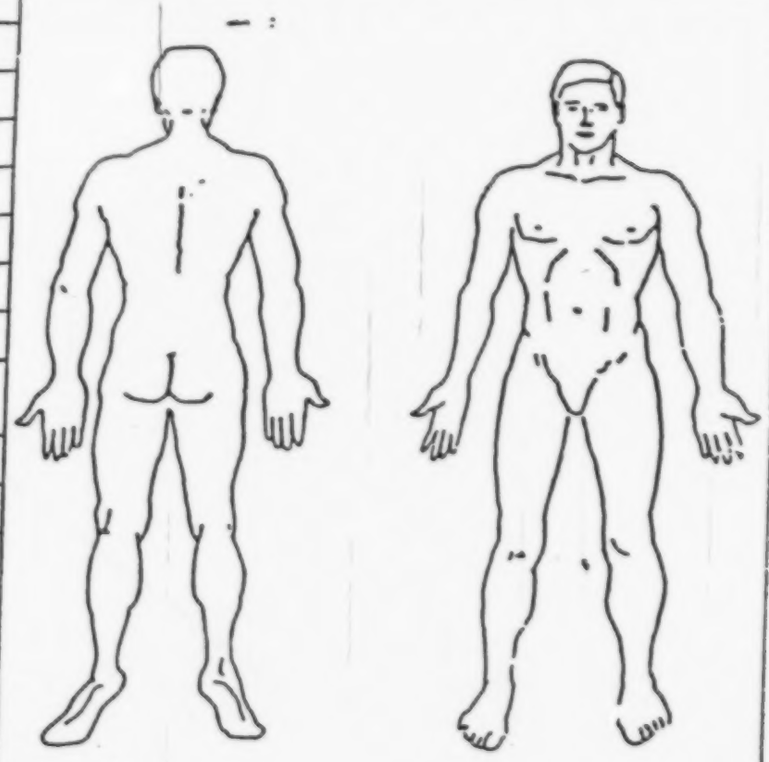
O Speech normal - Few scattered lacerations to L/L arm & right Reddened

PHYSICAL EXAMINATION

Area to right shoulder. No bleeding at this time. No Knots on head. Denies any visual disturbances. Ambulates well.

A. minor reddened area to right shoulder

ABRASION///	CONTUSION //	BURN XX XX	FRACTURE Z Z	LACERATION/ SUTURES



ORDERS, MEDICATION, etc.

P Release to D.O.C No treatment indicated @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

RELEASE/TRANSFER DATE	TIME	RELEASE/TRANSFERRED TO	CONDITION ON DISCHARGE
6 / 7 / 95	11:30 AM PM	☒ DOC ☐ AMBULANCE ☐	☒ SATISFACTORY ☐ POOR ☐ FAIR ☐ CRITICAL

NURSE'S SIGNATURE	DATE	PHYSICIAN'S SIGNATURE	DATE	CONSULTATION
Willa Nicholas	6-7-95			

PATIENT'S NAME (LAST, FIRST, MIDDLE)	AGE	DATE OF BIRTH	R/S	AIS #
Hogo Dan	38	7/5/57	B/M	181215

C.C.I.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff, v. MARK PELZER, GENE MCCLARAN, GREG JACKSON, GARY MCGEE, JOSEPH STEPHENSON, JIM GATES A/K/A KEITH GATES, JAMES KENT, and TED LOGGINS, Defendants.	*	CIVIL ACTION NO. 96-B-2968-S

SECOND AFFIDAVIT OF LARRY HOPE

(Filed Nov. 3, 1997)

COMES NOW the undersigned affiant and, being duly sworn, hereby deposes and states as follows:

1.

My name is Larry Hope, I am above the age of majority, and I am competent to testify about the matters contained in this affidavit as well as in my first affidavit dated March 26, 1996, a true and accurate copy of which is attached hereto as Exhibit "1" and is fully incorporated herein by reference. Both affidavits are based upon my own personal knowledge and are submitted for consideration by the Court in opposition to the Defendants' motion for summary judgment.

2.

I am the Plaintiff in the above captioned lawsuit, which I filed *pro se* while I was incarcerated and before I was able to retain legal counsel.

3.

In March of 1995 I was forty (40) years old and was incarcerated, for the first time in my life, at Limestone Correctional Facility, which is operated by the Alabama Department of Corrections.

4.

On May 11, 1995, while I was incarcerated at Limestone, I was working on a chain gang near an interstate highway when another inmate, Tony Perkins, started an argument with me.

5.

Defendant Gene McClaran ordered us to stop arguing and, mistakenly concluding that the argument was my fault, sent me back to the Limestone facility and ordered that I be placed on the hitching post because he claimed that I was being "disruptive to the work squad;" however, I had neither refused to work nor encouraged other inmates not to work at the time of that incident.

6.

Upon my return to Limestone, I was placed on the "hitching post" – meaning that my wrists were handcuffed to a horizontal pole that is approximately the same height as my head – in accordance with Defendant McClaran's instructions.

7.

I believe that the officer who actually put me on the hitching post was Defendant Sergeant Mark Pelzer; however, according to the incident report signed by Defendant McClaran and attached hereto as Exhibit "2" (which is also Exhibit "7" to Defendants' Special Report), I was placed on the hitching post by Defendant Gates and an officer named Mark Dempsey.

8.

Because I am just slightly taller than the hitching post itself, my arms grew tired from being handcuffed so high, and whenever I tried moving them to improve my circulation, the handcuffs would cut into my wrists and cause great pain and discomfort.

9.

I was forced to stand in this position for more than two (2) hours, after which I was released because a captain determined that the incident had been Perkins' fault rather than my own.

10.

I was not given any disciplinary write-up for the March 11 incident, nor had I been given any type of hearing before being placed on the hitching post on that date.

11.

I was again placed on the hitching post on June 7, 1995, after a fight which was started by a correctional officer who had cursed me and grabbed me by the neck because I was sleeping on the bus on the way to a work site.

12.

Because I began choking as a result of being grabbed by the neck, I tried to release the officer's grip by grabbing for his neck, at which time other officers became involved.

13.

I was then subdued, handcuffed, placed in leg irons, transported back to Limestone, and put on the hitching post by Defendants Loggins, Kent, Jackson, Stephenson, and McGee.

14.

The officer who actually cuffed me to the hitching post on June 7 was Defendant Gates.

15.

The photographs attached as Exhibits "3," "4, and "5" were taken while I was on the hitching post on June 7, and they are true and accurate depictions of me at that time and place.

16.

On June 7, I was left on the hitching post for approximately seven (7) hours, standing on my feet with my arms raised and restrained in very hot weather.

17.

As before, my ordeal on the hitching post was a very painful one, and whenever I tried to shift my weight or give my feet some relaxation, it would put a lot of pain on my wrist.

18.

While I was on the hitching post, I was deprived of water and was teased by two officers when I asked for water. On one occasion, they started to bring me water but ended up giving my water to some dogs. I was given some water once or twice during the entire seven hours, but that was not enough, and at one point during the hottest part of the day I was left without water for at least three hours.

19.

In addition to being to being deprived of water, I was teased by officers just for being on the hitching post.

20.

When I was finally released, my wrists were sore and appeared to be bruised. They became swollen and remained that way for at least another day.

21.

I did not receive a disciplinary charge or behaviour citation as a result of the June 7 incident, nor had I received a hearing of any kind before being placed on the hitching post.

/s/ Larry Hope
LARRY HOPE

Sworn and subscribed before me
this 27th day of October, 1997.

/s/ Barbara McQueen
NOTARY PUBLIC
[SEAL]

My commission expires: 8/19/98

Prepared by:

CRAIG T. JONES
Georgia Bar No. 399476
Lead counsel for Plaintiff
(Pro hac vice application pending)
CRAIG T. JONES, P.C.
3166 Mathieson Drive
Atlanta, GA 30305
(404) 842-0851

[Certificate Of Service Omitted In Printing]

EXHIBIT 1

Docket Number CV-96-B-2968-S

AFFIDAVIT

STATE OF ALABAMA)
JEFFERSON COUNTY)

LARRY HOPE, being duly sworn, hereby deposes and says:

I am incarcerated at Donaldson Correctional Facility. I was previously assigned to the Limestone Correctional Facility chain gang, where I was beaten and twice put on the hitching post.

On May 11, 1995, inmate Tony Perkins and I were having a verbal disagreement while out on the chain gang. Officer McClaran saw us and mistakenly concluded that we were about to assault one another. As a result, he ordered me put on the hitching post for being "disruptive to the work squad."

On June 7, 1995, I went to work along the highway on the chain gang. I took a nap on the bus to the works site because I was extremely tired. When the bus arrived, Officer Laugan stated, "Get you ass off the bus." When I told him that my name was Larry Hope, he stated "I don't give a damn what your name is, get off the bus." He then began choking me.

Because the choking made me unable to breathe, I grabbed the officer's neck in retaliation. Officer Laugan then threw his weight off the bus. We both fell off the bus and onto the ground. He landed on top of me and continued choking me.

Officers Kent, Jacksons, Stephen and MaGueee then came and kicked and punched me. As they finally snatched me off the ground, Officer Laugan slammed my head against the bus.

They took me to the health care unit, but I did not receive any treatment for my injuries there. A copy of my medical report is attached.

The guards then put me on the hitching post a second time. I was wearing a T-shirt, and an officer said "take that rag off of him. I have shit I need to clean off the van." They made me take off my shirt and remain shirtless all day while the sum beamed down and burned my skin.

Because I am just slightly taller than the hitching post itself, my arms grew tired from being handcuffed so high. I tried to swing them to improve my circulation, but this caused the cuffs to cut into me. By the time I got off the rail, my wrists were swollen and bruised.

I was very thirsty while on the post. But instead of giving me water, a guard cruelly taunted me about my thirst. He first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground. This was very frustrating for me.

/s/ Larry Hope
Larry Hope

Sworn before me this the 26 day of March, 1996

/s/ [Illegible]
Notary Public
My Commission Expires:
11-23-96

[The Following Notation Was Handwritten – Please Attention the Following:

"Affidavit is being resubmitted to the United States" District Court for the Northern District of Alabama as previously submitted to Southern Poverty Law Center dated March 26, 1996, and is (now) being submitted as ground(s) of the Plaintiff's Civil Action Suit i.e. etc.

L.H. re-initialed date: 11-1-96

L.H.

Plaintiff,

/s/ Larry Hope 181215
Signature of Affiant, Plaintiff]

EXHIBIT 2

STATE OF ALABAMA
BOARD OF CORRECTIONS
INSTITUTIONAL INCIDENT REPORT

1. Institution: Limestone Correctional Facility
2. Date: May 11, 1995
3. Time: 11:40 A.M.
4. Incident Number: LCF-95-1229
5. Location Where Incident Occurred: Interstate 65 north of mile marker 360
6. Type of Incident: Inmate Disagreement
7. Time Incident Reported: 11:41 A.M.

8. Who Received Report: /s/ Mark A. Pelzer COI
Sergeant Mark Pelzer

9. Victim:

a. N/A (Type Full Name) No. _____

b. _____ (Type Full Name) No. _____

10. Suspects:

a. Larry Hope No. B/181215

b. Tony Perkins No. W/181331

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

11. Witnesses:

a. N/A No. _____

b. _____ No. _____

c. _____ No. _____

d. _____ No. _____

e. _____ No. _____

f. _____ No. _____

g. _____ No. _____

Physical Evidence:

12. Type of Evidence: N/A

_____

13. Description of Evidence: N/A

_____

_____

14. Chain of Evidence: N/A

a. _____

b. _____

c. _____

d. _____

15. Narrative Summary: On May 11, 1995, at approximately 11:40 A.M., Officer Gene McClaran was assigned to chain gang #1. Officer McClaran's responsibilities included monitoring the squad on Interstate 65 just north of mile marker #360. Officer McClaran observed Inmates Larry Hope, B/181215 and Tony Perkins, W/181331 having a verbal disagreement. Officer McClaran attempted to intervene by giving a loud verbal statement to stop! Inmate Hope raised the swing blade he was working with and drew back with intentions of striking Inmate Perkins. Officer McClaran racked the slide bolt closed and instructed all the squad to get on the ground. Officer McClaran notified Sergeant Mark Pelzer of the situation. Officer McClaran's squad remained on the ground except for Inmates Hope and Perkins. Officer McClaran again instructed both inmates to get on the ground. Inmate Hope stated to Officer McClaran "fuck you". Sergeant Pelzer arrived and instructed both inmate to the ground, and they complied. Sergeant Pelzer removed Inmates Hope and Perkins from Officer McClaran's squad placing them in the Institutional transfer van. Officer Brian

Waters escorted Inmates Hope and Perkins to Limestone Correctional Facility at approximately 12:00 p.m.

At approximately 12:20 p.m. Inmates Hope and Perkins were placed on the Institutional security bar by Officer Keith Gates and Mark Dempsey.

At approximately 5:06 p.m. Officer McClaran released Inmate Perkins from the security bar and Nurse Paul Thornhill performed a body chart on Inmate Perkins. Officer McClaran escorted Inmate Perkins to the back gate of the Institution and was checked in by Sergeant Lloyd Wallace. Officer McClaran was notified by Sergeant Pelzer that Inmate Hope was released from the security bar at approximately 2:40 p.m. by Officer Keith Gates per Captain David J. Wise. A body chart was performed on Inmate Hope by Nurse Janet Gilliland at approximately 6:55 p.m. and released to his assigned dormitory. Inmate Hope and Perkins were reassigned to Squad #1. A peace agreement was signed by Inmates Hope and Perkins.

See attached: Body Charts
Activity Logs
Peace Agreements

/s/ Gene McClaran, COI
Gene McClaran, COI

LIFE MAGAZINE October 1945

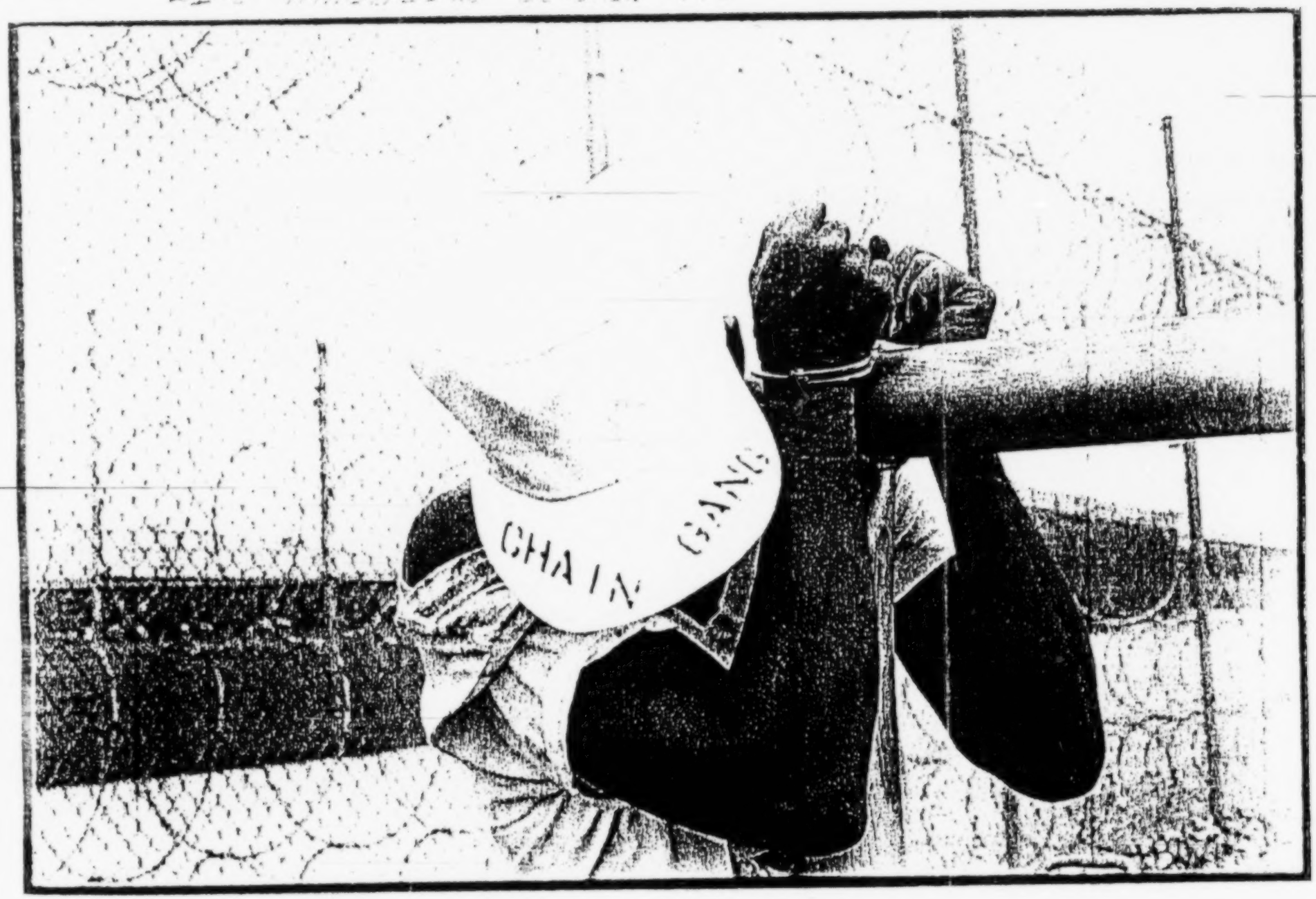


Exhibit 4

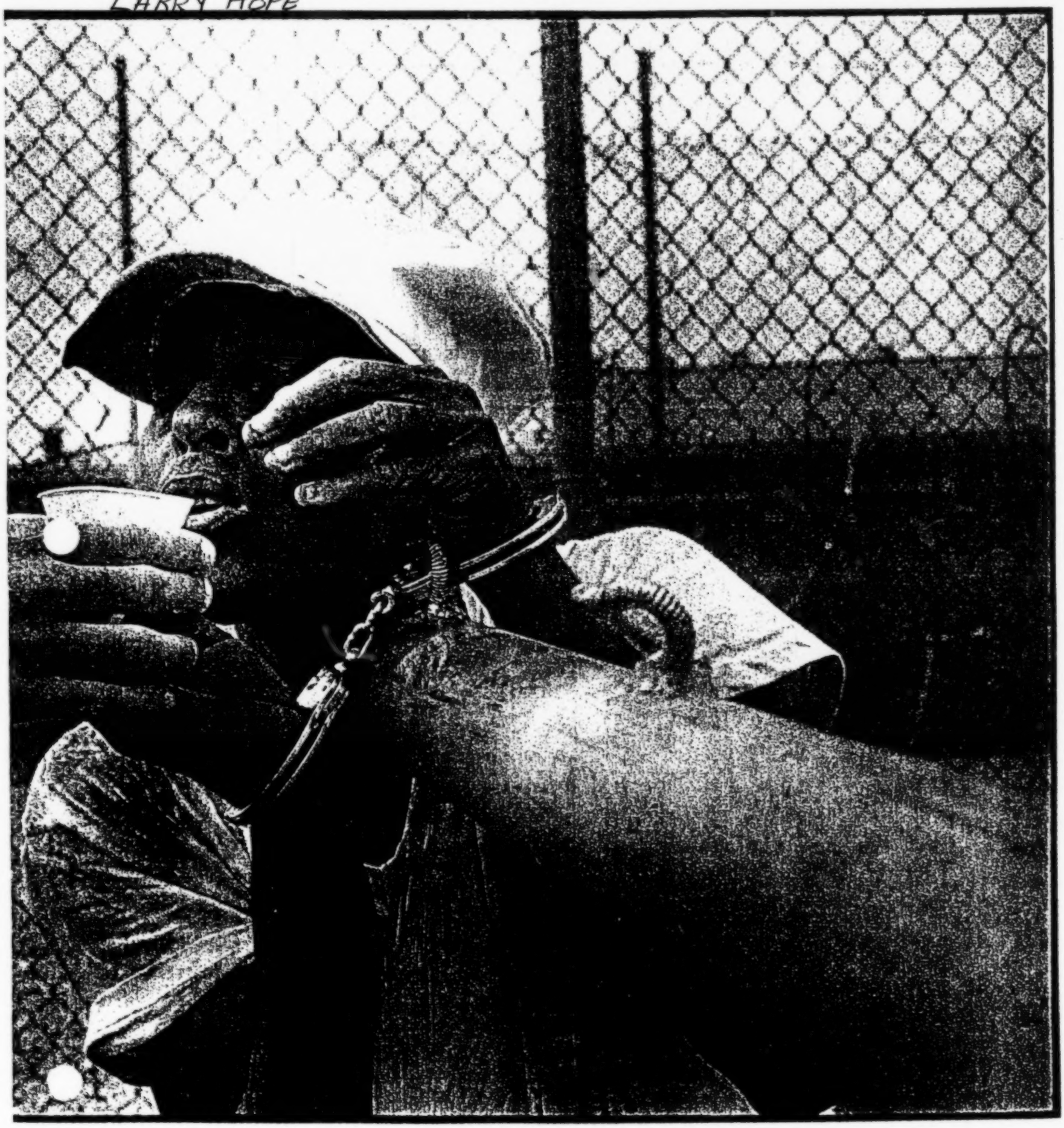
PLEASE ACKNOWLEDGE PHOTO EXHIBIT OF PLAINTIFF
THIS PHOTO WAS USED BY SOUTHERN POVERTY
LAW CENTER CV-910-B-1968-S

LIFE Mag.
October 1995

PLAINTIFF'S EXHIBIT 20

S. BU CONVICTS HATE BEING ON DISPLAY AND GIVING UP TV, SMOKING AND COFFEE PRIVILEGES.

LARRY HOPE





Larry Hope was refused water while hitched to the post during hot weather.

'Painful and Torturous Punishment' Must Be Abolished, Judge Says

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE,	)	
Plaintiff,	)	**CIVIL ACTION NO. 96-BU-2968-S**
vs.	)	
MARK PELZER, et al.,	)	
Defendants.	)	

RESPONSE TO COURT ORDER

Come now the Defendants, in the above-styled cause, by and through undersigned counsel, and hereby file this response to the Court Order stating as follows:

REMAINING ISSUES

Based on a conference call-on February 12, 1999, the remaining issues in this case are as follows:

I. Whether Res Judicata applies to the issues in this case?

II. Whether Inmate Hope pled a violation of the 14th Amendment?

III. Whether a claim for a 14th Amendment violation is barred based res judicata by *Austin v. James*?

IV. Whether the Defendants' use of the restraining bar on May 11, 1995, against Inmate Hope constituted cruel and unusual punishment?

V. Whether the Defendants' use of the restraining bar on June 7, 1995, against

Inmate Hope constituted cruel and unusual punishment?

VI. Whether the Defendants are entitled to qualified immunity from the Plaintiff's claim concerning use of the restraining bar violating the Eighth Amendment?

DEFENSES

The Defendants allege that Inmate Hope fails to state a cause of action against them for which relief can be granted.

Defendants are entitled to qualified good faith immunity from Plaintiff's complaint under 42 U.S.C. 1983.

Inmate Hope's claim under 42 U.S.C. § 1983 against the Defendants are partially based upon the theory of Respondeat Superior and cannot be maintained under 42 U.S.C. § 1983.

Defendants assert the doctrine of res judicata and/or collateral estoppel and contends he is barred from asserting this claim wherein he asserts monetary damages.

STATEMENT OF THE FACTS

Facts are set out in the special reports filed by the Defendants. Inmate Hope was placed on the restraining bar on two occasion, May 11, 1995 and June 7, 1995. Inmate Hope received no injuries from being placed on the restraining bar (Exhibit 1 – Body Chart May 11, 1995.)

ARGUMENTS

I. Whether Res Judicata applies to the issues in this case?

The Eleventh Circuit has held that "res judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the 'operative nucleaus of fact' ". *NAACP v. Hunt* 891 F.2d 1555, 1560 (11th Cir. 1990). A court must look to the factual issues to be resolved in the second cause of action. Moreover, privity exists where a party to the original suit is "so closely aligned to a nonparty's interest as to be his virtual representative." *United Merchants & Mfrs. V. Sanders,* 508 So. 2d 689, 692 (Ala. 1987). In this case, the actions are the same – an inmate is attacking the use of the restraining bar on Eighth Amendment grounds. In fact, the plaintiff is a class member in the case styled *Austin, et al., v. James, et al.,* Case No. 95-T-637-N which held that the restraining bar at times had been applied unconstitutionally under Eighth Amendment but ruled in favor of the Department of 14th Amendment grounds. This Plaintiff is a class member and testified at the hearing. Plaintiff's counsel claims that the settlement agreement concerning the chain gang allows them to file for money damages concerning the restraining bar. The settlement agreement of the chain gang issue has no effect on the restraining bar issue. There has been no agreement that money damages can be pursued concerning the restraining bar. Plaintiffs' counsel in the class action addressing the restraining bar chose not to pursue money damages. Therefore, money damage claims for use of the restraining bar are barred by res judicata.

II. Whether Inmate Hope pled a violation of the Fourteenth Amendment?

Defendants' contend that Plaintiff never pled a violation of the Fourteenth Amendment concerning use of the restraining bar. Thus, the Fourteenth Amendment is not an issue in this case.

III. Whether a claim for a 14th Amendment violation is barred based res judicata by *Austin v. James*?

In *Austin v. James*, the District Court held that the restraining bar only violated the Eighth Amendment (Exhibit 2 – p. 1 of the Memorandums Opinion and Judgment). Thus, the claim of the Fourteenth Amendment is barred.

IV. Whether the Defendants use of the restraining bar on May 11, 1995, against Inmate Hope constituted cruel and unusual punishment?

This issue has been previously addressed in Defendants' Special Report.

V. Whether the Defendants use of the restraining bar on June 7, 1995, against Inmate Hope constituted cruel and unusual punishment?

This issue has been previously addressed in Defendants' Special Report.

VI. Whether the Defendants are entitled to qualified immunity from the Plaintiff's claim concerning use of the restraining bar violating the Eighth Amendment?

A review of the Plaintiff's claims reveal the plaintiff has failed to establish the requisite causal connection between the supervisory defendants and the alleged constitutional deprivation. Any allegation by the Plaintiff against supervisory officers other than correctional officers Is, is an attempt to hold them liable in their supervisory capacity. Supervisory officials are not liable under Section 1983 on the basis of respondeat superior or vicarious liability. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct 2018, 56 L. Ed.2d 611 (1978); *Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992). Supervisory officials "[can]not be held liable under § 1983 for having the 'mere right to control without any control or direction having been exercised.' " *Gilmere v. Atlanta*, 774 F.2d 1495, 1504 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986), quoting *Monell, supra*, 436 U.S. at 694 n.58, 98 S.Ct. at 2037 n.58.

A supervisor may be liable under § 1983 if he or she participates directly in acts constituting a constitutional violation or if the challenged actions are causally connected to a constitutional violation. *H.C. v. Jarrard*, 786 F.2d 1080, 1086-87 (11th Cir. 1986); *Dean v. Barber, supra.*

The Correctional Defendants have previously asserted the affirmative defense of qualified immunity. The defendants assert that they are entitled to qualified immunity for all those claims which seek money damages. It has long been the law that public officials are

entitled to qualified immunity from damages if "their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would know." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Supreme Court in *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), clarified the appropriate standard by concluding that qualified immunity "turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken". The Court went on to note that, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640.

Qualified immunity is an affirmative defense which must be asserted by the official claiming it. *Siegert,* ___ U.S. at ___, 114 L.Ed.2d at 286; *Harlow,* 457 U.S. at 815; *Gomez v. Toledo,* 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). In determining qualified immunity, the Eleventh Circuit follows a two-step analysis:

> "1. The Defendant public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Rich v. Dollar,* 841 F.2d 1558, 1563 (11th Cir. 1988). . . . "
>
> and
>
> 2. Once the Defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the Plaintiff to show lack of good faith on the Defendants part. This burden is net by proof demonstrating that the Defendant public official's actions 'violated clearly established constitutional law.' "

Suissa v. Fulton County, Georgia, 74 F.3d 266, 269 (11th Cir. 1996), *Lowe v. Aldridge,* 958 F.2d 1565, 1570 (11th Cir. 1992).

There is no question, and the court has previously determined, that the Defendants actions were taken within the scope of his discretionary authority. As outlined in *Jordan v. Doe,* 38 F.3d 1559 (11th Cir., 1994), "discretionary authority" can be shown by "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." In reversing the lower court, *Jordan* held that the Marshall's actions in that case were "discretionary" regardless of whether the actions could be characterized as ministerial or discretionary in nature and that it would be unwise to "engage in a case by case determination" of immunity based upon ministerial versus the discretionary nature of a particular act challenged. As the first criteria is apparent, the burden shifts to the Plaintiff to show a lack of good faith by proving that the actions undertaken by these Defendants violated clearly established law. To overcome this enormous burden, a Plaintiff must come forward with particularized facts demonstrating why the public official is not entitled to claim that defense. *Anderson v. Creighton,* 483 U.S. at 646; *Harlow,* 457 U.S. at 818. The burden on a plaintiff opposing a qualified immunity defense is onerous.

> A plaintiff must establish more than broad legal truisms; he or she must demonstrate that the law fixed the contours of the right so clearly that

> a reasonable official would have understood his acts were unlawful. . . . Thus, "pre-existing law must dictate, that is truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances."

Dolihite v. Maughon, 74 F.3d 1027, 1040-1041 (11th Cir.), cert. denied, ___ U.S. ___, 117 S.Ct. 185 (1996) (citations omitted)

As the Eleventh Circuit has espoused, general propositions "have little to do with the concept of qualified immunity." *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987). As articulated in *Muhammad*:

> The words "clearly established . . . constitutional right" may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms, so that anyone who prevails on the merits of the claim based on (for example) the First Amendment's free exercise of religion clause, however novel that claim is, can defeat the defense of immunity simply by pointing out that the right to the free exercise of one's religion has long been a clearly established right. The right must be sufficiently particularized to put potential Defendants on notice that their conduct probably is unlawful.

839 F.2d at 1425, quoting *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986).

Moreover, the Eleventh Circuit, in *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), further clarified this concept by

stating that the question concerning qualified immunity must be sharply focused:

> The question in this case is not whether it is clearly established that unreasonable seizures are prohibited; they are. Nor is the question whether probable cause is necessary for a lawful warrantless arrest; it is. Nor is the question whether an involuntary trip to the police station can violate the fourth amendment; it can. The question in this case is far more sharply focused: in March 1983, was it clearly established in this circuit that it was an unconstitutional seizure for a single police officer – shortly after a murder – to have a person in a public place accompany him (along with other family members who were potential witnesses) to police headquarters for further questions, where the person had initiated contact with law enforcement officials by going to a police station to report the murder, had claimed to have seen the shooting and the assailant who was still at large, had remained in the officer's presence while willingly assisting with the investigation, and never objected to traveling to headquarters? The answer is No.

In *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1150 (11th Cir., 1994) (en banc), the Court commented that:

> "The most common error we encounter, as a reviewing court, occurs on this point: Courts must not permit Plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights' ".

In *Alexander v. University of North Florida*, 39 F.3d 290 (11th Cir. 1994), the Eleventh Circuit observed: "As we

explained in *Lassiter v. Alabama A & M University,* 28 F.3d 1146 (11th Cir. 1994) (en banc), qualified immunity for government officials is the rule, liability and trials for liability the exception." Moreover, in *Belcher v. City of Foley, Alabama,* 30 F.3d 1390, 1400 (11th Cir. 1994), the Court found that "law is clearly established by holdings, not by inferences from language in opinions." As if to strengthen this already straightforward rule, the Eleventh Circuit reiterated that in order for a law to be "clearly established", the law by which officials should be evaluated must be 1) pre-existing; 2) obvious and 3) mandatory. *Hill v. DeKalb Regional Youth Detention Center,* 40 F.3d 1176 (11th Cir. 1994). Qualified immunity must focus on the " . . . actual, on the specific, on the details of concrete cases". *Lassiter* at 1150. "Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases" *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563 (11th Cir. 1992).

In *Williams v. Burton,* 943 F.2d 1572 (11th Cir. 1991), a panel of the Eleventh Circuit Court of Appeals rejected an Eighth Amendment claim when an inmate was gagged and shackled in 4-point restraints for approximately 28½ hours. The Court reasoned that the inmate was threatening and attempting to incite violence by other inmates and that the use of the restraint, securing the inmate to the bunk, was not infliction of unnecessary and wanton pain for malicious or sadistic reasons.

Although the burden is not on the defendants to come forward with case law, the defendants submit that even on May 11, 1995, the first day of the Plaintiff's placement on the restraining bar at Limestone Correctional Facility, it was not clearly established that the use

of the restraining bar was cruel and unusual punishment or amounted to summary punishment violative of the due process clause. They assert that no "bright line", capable of discernment by all but the "plainly incompetent", rule of law had been established regarding the constitutionality of the use of the retraining bar. The defendants agree that District Court decisions, alone, do not establish "clearly defined law" for purposes of qualified immunity. However, the defendants are reminded that they are "not obligated to be creative or imaginative in drawing analogies from previously decided cases" *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563 (11th Cir. 1992).

The Plaintiff relies solely on *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974) to clearly establish that the conduct of the defendants was plainly unconstitutional. However, the reading of this case shows it was a system wide attack on prison conditions and one wherein the governor conceded the unconstitutionality of the conditions. The only mention of behavior similar to that alleged in the plaintiff's complaint is contained in a portion of a paragraph in this thirty-one (31) page opinion, which reads that corporal punishment such as

> administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and cell for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise

> maintain awkward positions for prolonged periods . . . We have no difficulty in reaching the conclusion that these forms of punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.

Gates v. Collier, 501 F.2d at 1306. The opinion in *Gates* does not establish the law "in such concrete and factually defined context" that it would compel all reasonable prison officials, in the defendants position, to conclude that their actions were unlawful. The defendants are "not obligated to be creative or imaginative in drawing analogies from the decision in *Gates*. *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563 (11th Cir. 1992). To require these defendants to draw this legal inference from this sole 1974 decision would be an unrealistic expectation on these defendants. Such an expectation would require these untrained prison officials to draw inferences that even two federal Magistrate Judges, Judge Putnam and Judge McPherson, and two attorneys for parties of record were unable to draw after concerted legal research in the cases of *Whitson v. Lt. Gillikin*, CV-93-H-1517-NE (U.S.D.C. N.D. Ala. 1994) (Exhibit 3) and *Marvin Hudson v. Fob James, et al.*, CV-96-D-1266-N (U.S.D.C. M.D. Ala.). In that case, the plaintiff was represented by counsel and he asserted claims that on July 6, 1993, he was denied needed medical attention and was handcuffed to a rail or bar for a period of eight hours without food, water or the opportunity to use bathroom facilities. In that opinion, Magistrate Judge Putnam found the following facts:

> On July 6, 1993, plaintiff was assigned to work on a farm squad at the Limestone Correctional

> Facility, and shortly before 6:00 a.m. he was ordered to report to work. At that time, the plaintiff informed defendants Gilliken and Wise that he was suffering from a rash and was in need of medical attention. Sgt. Gates asked for the plaintiff's "stop-up" which is a medical authorization from the prison health care unit excusing prisoners from work due to health reasons. Plaintiff stated that he did not have one and that no one in the health care unit would give him a stop-up. Sgt. Gates told plaintiff that he could either go to work or "be placed on the security bar." Plaintiff refused to check out for his farm work unit, so defendant Gates escorted the plaintiff to a long metal bar to which he handcuffed the plaintiff. Plaintiff remained handcuffed at the bar or hitching rail from approximately 6:00 a.m. until approximately 2:00 p.m. that day. Although he had eaten breakfast that morning, he was offered no food or water or given any opportunities to use the bathroom facilities during the eight hour span. The daytime temperature ranged from 90 to 95 degrees. At approximately 2:00 p.m., the plaintiff was released from handcuffs and escorted by another officer to the prison health care unit for an examination. As a result of the handcuffing, the plaintiff suffered lacerations, pain, and swelling in his arms, although he was not treated by a physician at the health care unit.

(See Exhibit 3; Magistrate's Recommendation, *Whitson v. Lt. Gillikin*, CV-93-H-1517-NE (U.S.D.C. N.D. Ala.1994)). In evaluating the plaintiff's claim arising under the Eighth Amendment, the Court found this question "more problematic." Judge Putnam stated,

> He alleges that he was handcuffed to a bar or hitching post for eight hours without food, water, or the use of bathroom facilities in 90 to 95 degree heat. Plaintiff makes a strong argument that the practice of handcuffing recalcitrant prisoners to the security bar for eight hours is cruel and unusual punishment in that it amounts to wanton infliction of pain without penological justification. Because the defendants have pled the defense of qualified immunity, however, the court is not called upon to decide this difficult question because it is apparent that on July 6, 1993, there was no clearly established law identifying this practice as unconstitutional.

(See Exhibit 3, page 7) In evaluating qualified immunity, Judge Putnam continued,

> The court has made a diligent search of the case law to attempt to answer the question whether handcuffing, shackling, or chaining a prisoner to a fixed object for a period of several hours violated the Eighth Amendment prohibition against cruel and unusual punishment. It was with an eye toward this question that the court requested additional briefs from the parties, hoping to have their assistance in identifying any cases that might be said to clearly establish a rule of law in this area. Neither the court not the parties have identified any cases, binding or otherwise in this circuit, in which it was found that the Eighth amendment was violated by shackling or handcuffing a prisoner to a fixed object for a significant period of time due to the prisoner's refusal to work. Indeed the few cases that involve remotely analogous fact situations have upheld the use of physical restraints or coercive measures.

(See Exhibit 3, page 8-9) When considering two decisions from the United States District Court for the Southern and Middle District of Alabama, submitted by the defendants, the Court stated these decisions show "nonetheless the absence of a clearly established right to be free of handcuffing to a fixed object for refusing to work. Whether or not these opinions are ultimately right on the Eighth Amendment question, they demonstrate that this particular Eighth Amendment right was not clearly established." (See Exhibit 3, page 10)

In addition, the defendants submit that the Federal Courts in Alabama have found that the use of the restraining bar did not violate the constitutional rights of the inmates and met constitutional muster in the following cases: *Randall Williamson v. Anderson,* CV-92-H-675-N (U.S.D.C. M.D. Ala.) arising from an incident occurring on May 28, 1992; *Ronald Hollis v. Jim Folsom, et al.,* CV-94-T-0052-N (U.S.D.C. M.D. Ala.), incident occurring March 28, 1993; *Walter Vinson v. Leslie Thompson, et al.,* CV-94-A-268-N (U.S.D.C. M.D. Ala.), *Michael Kimble v. Roy Hightower,* CV-95-B-1328-S (U.S.D.C. N.D. Ala.), incident that arose March 31, 1995; *Randall Ashby v. Steve Dees, et al.,* CV-94-U-0605-NE (U.S.D.C. N.D. Ala.), incident arose March 8, 1994; *Jeffery Lane v. Harry D. Findley, et al.,* CV-93-C-1741-S (U.S.D.C. N.D. Ala.), incident arose August 13, 1993; (See Exhibit 2; Magistrate Recommendations).

In *Marvin Hudson v. Fob James, et al.,* CV-96-D-1266-N (U.S.D.C. M.D. Ala.), the Court was confronted with a challenge to the use of the restraining bar arising from incidents in October of 1995. Admittedly, the Court found that the use of the restraining bar violated plaintiff's

Eighth Amendment rights. However, as the defendants asserted the defense of qualified immunity, the Court was obligated to examine whether the defendants were immune from liability for damages because the right was not "clearly established." In evaluating qualified immunity and granting this affirmative defense, Judge McPherson stated, "The Plaintiff likewise fails to cite the court to any authority which plainly establishes that the practice of confining inmates to a hitching post was constitutionally infirm." Judge McPherson continued in a footnote, "The Court's independent research was equally unsuccessful in identifying any such cases." *Marvin Hudson v. Fob James, et al.*, CV-96-D-1266-N (U.S.D.C. M.D. Ala.).

These District Court decisions, although not in and of themselves enough to clearly establishing law, are sufficient reliable information regarding the status of constitutional law in this area, to lead an objectively reasonable correctional official(s) to believe that their actions in using the restraining bar did not violate well established constitutional rights of the plaintiff, or any other inmate in question.

For the aforementioned reasons, the defendants contend they are entitled to qualified immunity for all claims for monetary damages. As there are no issues of material fact and for the reasons herein stated, Defendants

pursuant to F.R.C.P. 56(b), requests that their motion for summary judgment be granted.

Respectfully submitted,

/s/ Ellen Leonard
ELLEN LEONARD
ASSISTANT GENERAL
COUNSEL

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[Certificate Of Service Omitted In Printing]

BEST AVAILABLE COPY

[illegible]ARTMENT OF CORREC[illegible]

EMERGENCY/(OTHER) TREATMENT RECORD

DATE 5/11/95 TIME 1650 AM (PM)

FACILITY [illegible] ☐ SIR ☐ POL ☐ ESCAPEE ☐

☐ EMERGENCY ☒ OTHER

ALLERGIES NKA

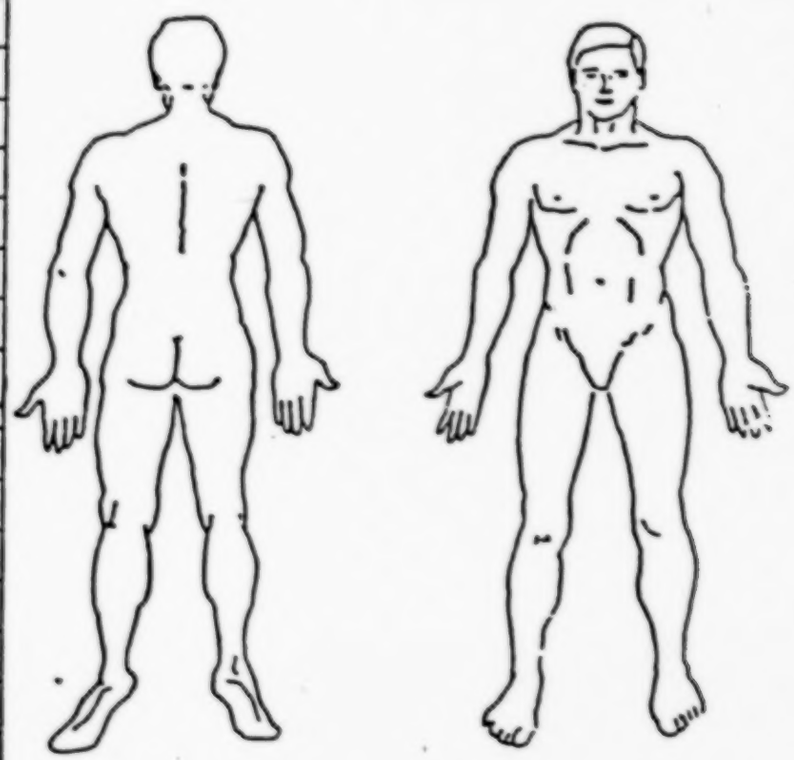
CONDITION ON ADMISSION ☒ GOOD ☐ FAIR ☐ POOR ☐ SHOCK ☐ HEMORRHAGE ☐ COMA

VITAL SIGNS: TEMP 98.6 (ORAL) RECTAL RESP. 18 PULSE 72 B/P 130/50 RECHECK IF SYSTOLIC <100> 50

NATURE OF INJURY OR ILLNESS

5' I was instructed to a pt. today.

ABRASION/// CONTUSION # BURN XX XX FRACTURE Z Z LACERATION/ SUTURE



PHYSICAL EXAMINATION

5' No bruises contusions fractures or lacerations noted No S/S trauma or illness

12 No S/S trauma or illness

ORDERS, MEDICATION, etc.

P Pt was cited. wrote on WH & MAC submitted for employee transfer transfer canceled sent memo to [illegible] WH & the Dr's involved

Pt left @ this time

DIAGNOSIS

INSTRUCTIONS TO PATIENT

Sign up for sick call as needed

RELEASE/TRANSFER DATE 5/11/95 TIME 1655 AM (PM)

RELEASE/TRANSFERRED TO ☒ DOC ☐ AMBULANCE ☐

CONDITION ON DISCHARGE ☒ SATISFACTORY ☐ FAIR ☐ POOR ☐ CRITICAL

NURSE'S SIGNATURE [illegible] DATE 5/11/95

PHYSICIAN'S SIGNATURE DATE

CONSULTATION

PATIENT'S NAME (LAST, FIRST, MIDDLE) [illegible] AGE DATE OF BIRTH [illegible] R/S [illegible] AIS # [illegible]

EXHIBIT 1

EXHIBIT 2

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE

MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

MICHAEL A. AUSTIN, RICHARD ELLIOT, OGIE LEE HAYES, CHARLES ORLANDER GUESS, WARREN LEATHERWOOD and KERVIN GOODWIN,

Plaintiffs,

v.

JOE HOPPER, Commissioner of the Alabama Department of Corrections,

Defendant.

CIVIL ACTION NO.
95-T-637-N

MEMORANDUM OPINION

(Filed Aug. 10, 1998)

In this class-action lawsuit, the plaintiffs, who are inmates in the Alabama prison system, challenged the following four policies and practices employed by the prison system: (1) the use of "chain gangs"; (2) the use of "hitching posts"; (3) the denial of visitation rights to certain inmates; and (4) the failure to provide adequate toilet facilities to inmates on work squads. The plaintiffs claim that these policies and practices violated the first, fifth, eighth, and fourteenth amendments to the United States Constitution, as enforced through 28 U.S.C.A. § 1983. The plaintiffs named the Commissioner of the

Department of Corrections (hereinafter "DOC") as defendant. The subject-matter jurisdiction of the court has been properly invoked pursuant to 28 U.S.C.A. §§ 1331, 1343(a)(4).

* * *

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

MICHAEL A. AUSTIN,
RICHARD ELLIOT, OGIE
LEE HAYES, CHARLES
ORLANDER GUESS,
WARREN LEATHERWOOD,
and KERVIN GOODWIN,

Plaintiffs,

v.

JOE HOPPER, Commissioner
of the Alabama Department
of Corrections,

Defendant.

CIVIL ACTION NO.
95-T-637-N

JUDGMENT

(Filed Aug. 10, 1998)

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that the recommendation of United States Magistrate Judge Vanzetta Penn McPherson,

entered January 28, 1997 (Doc. no. 372), is adopted in part and rejected in part:

It is further ORDERED as follows:

(1) The parties' joint motion, filed June 28, 1996 (Doc. no. 155), for approval of the settlement agreement on the chain-gang claim is granted with the modification that the plaintiffs' claim is dismissed *without* prejudice.

(2) Pursuant to said settlement agreement, and on the court's independent evaluation of the certification requirements, the following plaintiff class is certified: all present and future Alabama inmates who have been or may be assigned to work in chain gangs, with the class represented by named plaintiffs Michael A. Austin, Richard Elliot, Ogie Lee Hayes, Charles Orlander Guess, Warren Leatherwood, and Kervin Goodwin.

(3) The plaintiffs' chain-gang claim is dismissed without prejudice.

It is further ORDERED as follows:

(1) The parties' joint motion, filed September 27, 1996 (Doc. no. 344), for preliminary approval of the settlement agreement of the toilet-facilities claim is granted.

(2) A fairness hearing is set for November 17, 1998, at 10:00 a.m. in the second floor courtroom of the federal courthouse in Montgomery, Alabama.

(3) By no later than September 8, 1998, the parties shall file with the court the following:

(a) A joint proposed notice to the members of the putative plaintiff class regarding the settlement;

(b) A joint proposed means of distributing notice to the putative class; and

(c) A joint proposed form for putative class members to use to file their objections.

(4) A status conference on the issue of notice to the putative class is set for September 21, 1998, at 8:00 a.m. in chambers at the federal courthouse in Montgomery, Alabama.

It is further ORDERED that the plaintiff's motion for class certification, filed May 18, 1995 (Doc. no. 8) and amended motion for class certification, filed March 11, 1996 (Doc. no. 74), are granted, and two classes of plaintiffs are certified in this section as follows:

(1) All present and future Alabama inmates who have been or may be assigned to the ATU, with the class represented by named plaintiffs Michael A. Austin, Richard Elliot, Ogie Lee Hayes, Charles Orlander Guess, Warren Leatherwood, and Kervin Goodwin.

(2) All present and future Alabama inmates who have been or may be placed on the hitching post, with the class represented by named plaintiffs Michael A. Austin, Richard Elliot, Ogie Lee Hayes, Charles Orlander Guess, Warren Leatherwood, and Kervin Goodwin.

It is further ORDERED that judgment is entered in favor of defendant Commissioner of the Department of Corrections and against the plaintiffs on the plaintiffs' visitation-privileges claim.

It is further ORDERED as follows:

(1) Judgment is entered in favor of plaintiffs and against defendant Commissioner of the Department of Corrections on the plaintiffs' hitching-post claim.

(2) It is DECLARED that the manner in which defendant Commissioner of the Department of Corrections has used the hitching post violates the eighth amendment to the United States Constitution.

(3) A supplemental hearing is set for September 22, 1998, at 10:00 a.m. in the second floor courtroom of the federal courthouse in Montgomery, Alabama. The parties are to submit prehearing briefs by September 17, 1998.

(4) Defendant Commissioner of the Department of Corrections is allowed until August 24, 1998, to submit to the court a written assurance that he will suspend the use of the hitching post until the parties have had an opportunity to update the court on whether the post is still being used in an unconstitutional manner and whether the post can be used in a constitutional manner. If the court does not receive such an assurance, it will then consider whether to issue interim prospective injunctive relief.

It is further ORDERED that costs are taxed against the defendant Commissioner of the Department of Corrections, for which execution may issue.

DONE, this the 10th day of August, 1998.

/s/ Myron Thompson
UNITED STATES
DISTRICT JUDGE

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY WHITSON, Plaintiff, vs. LT. GILLIKIN; DONNA WISE; DARYL GATES, Defendants.	)	Civil Action CV-93-H-1517-NE (Filed Jan. 24, 1994)

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

This is an action by an Alabama prisoner under 42 U.S.C. § 1983, in which he alleges that the named defendants violated his eighth Amendment right to be free from cruel and unusual punishment. He claims that on July 6, 1993, the defendants not only deprived him of needed medical attention, but also handcuffed him to a rail or bar for a period of eight hours without food, water, or the opportunity to use bathroom facilities. In accordance with the usual practices of this court, and 28 U.S.C. § 636(b), the complaint was referred to the undersigned magistrate judge for a preliminary review and recommendation.

The plaintiff filed his pro se complaint[1] on July 30, 1993, naming as defendants Lt. Gillikin, Donna Wise, and

[1] Although the complaint was filed *pro se*, counsel appeared for plaintiff on September 17, 1993.

Daryl Gates[2], all of whom are employed as corrections officers at the Limestone Correctional Facility. He sues the defendants in both their individual and official capacities, for compensatory and punitive damages. In response to the court's order for special report entered August 13, 1993, the defendants filed a special report on September 24, 1993, asserting the defenses of qualified immunity, official capacity immunity and the general denial that they violated the plaintiff's constitutional rights. The special report was supported by the affidavits of defendants Gates and Gilliken.

On October 25, 1993, the plaintiff filed his response and counter-affidavits to the special report filed by the defendants. The plaintiff's response included counter-affidavits by the plaintiff and three other inmates.

In an order dated December 3, 1993, the court requested additional briefs from the parties on the question of qualified immunity, particularly in light of the Eleventh Circuit cases *Courson v. McMillian*, 939 F.2d 1479 (11th Cir., 1991) and *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir., 1993).[3] The parties filed briefs on December 22 and December 30 in response to the court's request.

[2] Although identified by plaintiff as "Daryl" Gates, the defendant's true name is Jim Gates.

[3] By order entered October 6, 1993, the court notified the parties that the special report filed by the defendants would be treated as a motion for summary judgment under Rule 56 F.R.Civ.P.

SUMMARY JUDGMENT STANDARDS

Because the court is treating the special report from the defendants as a motion for summary judgment, the court must determine whether there are any genuine issues of material fact and whether the moving defendants are entitled to judgment as a matter of law. Summary judgment may be granted only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See F.R.Civ.P. 56.* In making that assessment, the court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences against the moving party. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden of proof is upon the moving party to establish his prima facie entitlement to summary judgment by showing the absence of genuine issues and that he is due to prevail as a matter of law. *See Clark v. Coats & Clark, Inc.,* 929 F.2d 604 (11th Cir., 1991). Once that initial burden has been carried, however, the non-moving party may not merely rest upon his pleading, but must come forward with evidence supporting each essential element of his claim. *See Celotex Corp. v. Catrett; Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Barfield v. Brierton,* 883 F.2d 923 (11th Cir., 1989). Unless the plaintiff, who carries the ultimate burden of proving his action, is able to show some evidence with respect to each element of his claim, all other issues of fact become immaterial and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett; Bennett v. Parker,* 898 F.2d 1530 (11th Cir., 1990). As the Eleventh Circuit has explained:

> Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure to proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." [Citation omitted]. Thus, under such circumstances, the public official is entitled to judgment as a matter of law, because the plaintiff has failed to carry the burden of proof. This rule facilitates the dismissal of factually unsupported claims prior to trial.

Bennett v. Parker, 898 F.2d at 1532.

Applying these principals to the evidence before the court, the following facts appear to be undisputed or, if disputed, taken in a light most favorable to the plaintiff. On July 6, 1993, plaintiff was assigned to work on a farm squad at the Limestone Correctional Facility, and shortly before 6:00 a.m. he was ordered to report for work. At that time, the plaintiff informed defendants Gilliken and Wise that he was suffering from a rash and was in need of medical attention. Defendant Gates asked for the plaintiff's "stop-up" which is a medical authorization from the prison health care unit excusing prisoners from work due to health reasons. Plaintiff stated that he did not have one and that no one in the health care unit would give him a stop-up. Sgt. Gates told plaintiff that he could either go to work or "be placed on the security bar." Plaintiff refused to check-out for his farm work unit, so defendant Gates escorted the plaintiff to a long metal bar to which he handcuffed the plaintiff. Plaintiff remained handcuffed at the bar or hitching rail from approximately 6:00 a.m. until

approximately 2:00 p.m. that day. Although he had eaten breakfast that morning, he was offered no food or water or given any opportunities to use bathroom facilities during the eight hour time span. The daytime temperature ranged from 90 to 95 degrees. At approximately 2:00 p.m., the plaintiff was released from handcuffs and escorted by another officer to the prison health care unit for an examination. As a result of the handcuffing, the plaintiff suffered lacerations, pain, and swelling in his arms, although he was not treated by a physician at the health care unit. Later that evening, at 11:30 p.m., the plaintiff was seen by health care personnel again and given Calamine Lotion and Benadryl for a rash. He was not, however, given a stop-up or an excuse from work by medical personnel.

DISCUSSION

Plaintiff has pled two claims for relief under § 1983. His first claim alleges that he was denied needed medical attention in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Similarly, his second claim for relief asserts that his Eighth Amendment right was violated by the defendants when Sgt. Gates handcuffed him to the security bar for a period of eight hours after he refused to work. Plaintiff has sued the defendants for compensatory and punitive damages in both their official and personal capacities.

Insofar as the plaintiff seeks damages against the defendants in their official capacities, they are entitled to Eleventh Amendment immunity. As officers of the state, the defendants are merely the alter-egos of the state and

cannot be sued for damages. *See Alabama v. Pugh* 438 U.S. 781 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Tittle v. Jefferson County Commission,* ___ F.3d ___ (11th Cir., Case No. 91-7054, January 6, 1994). Moreover, officials of a state sued in their official capacity are not "persons" within the meaning of § 1983 and, hence, are not subject to liability in their official capacity. *See Will v. Michigan Dept. of State Police* 491 U.S. 58 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Thus, the claim for damages against the defendants in their *official* capacities is due to be dismissed.

Although not subject to suit in their official capacities, state agents or employees are subject to suit under § 1983 in their *individual* capacities. It is as individuals that they are sued for allegedly violating the plaintiff's Eighth Amendment rights by denying him medical care and subjecting him to unduly harsh and punitive conditions.

The Eighth Amendment prohibition against cruel and unusual punishment imposes a duty on state prison officials to provide prisoners with reasonable medical care for their serious medical needs. An action for damages will lie only where the plaintiff shows that the defendants were deliberately indifferent to his serious medical needs. *See Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). As pled in this case, the plaintiff asserts that he had a rash the morning of July 6, 1993 and was in need of medical attention, which was denied by these defendants. The undisputed facts show further, however, that plaintiff's rash was not a "serious" medical need. The Eighth Amendment does not require medical attention for every ache, pain, or physical infirmity identified by

prisoners; it is offended only if prison officials are deliberately indifferent to *serious* medical needs. *See Estelle v. Gamble, supra; Hamm v. DeKalb County* 774 F.2d 1567 (11th Cir., 1985); *Wilson v. Franceschi,* 735 F.Supp 395 (M.D.Fla., 1990). Not every headache or stomach pain that can be the subject of a prisoner complaint implicates the serious concerns of the Eighth Amendment.

In this case, to the extent the plaintiff suffered from a rash, it was not so serious as to justify immediate attention or to excuse him from his assigned work detail. The undisputed evidence establishes that the plaintiff was examined by medical personnel in the health care unit around 2:00 p.m. yet did not receive Calamine Lotion and Benadryl for a rash until much later that evening, at 11:30 p.m. Even then, however, plaintiff was not given a stop-up by medical personnel or excused from work in the days that followed. Plaintiff's rash on the morning of July 6, 1993, was not a serious medical need in the sense that it required immediate medical intervention or was debilitating. The decision by defendants not to excuse the plaintiff from his assigned work detail because of a rash was not deliberate indifference given the plaintiff's statement that medical personnel had refused to give him a stop-up and in light of the relatively minor treatment given for the rash later that day and night. The defendants were not, therefore, deliberately indifferent to the plaintiff's *serious* medical needs and did not violate the Eighth Amendment in this respect.

Plaintiff's second claim under the Eighth Amendment is far more problematic. He alleges that he was handcuffed to a bar or hitching post for eight hours

without food, water, or the use of bathroom facilities in 90 to 95 degree heat. Plaintiff makes a strong argument that the practice of handcuffing recalcitrant prisoners to the security bar for eight hours is cruel and unusual punishment in that it amounts to a wanton infliction of pain without penological justification. Because the defendants have pled the defense of qualified immunity, however, the court is not called upon to decide this difficult question[4] because it is apparent that on July 6, 1993, there was no clearly established law identifying this practice as unconstitutional.

Officials sued under § 1983 are entitled to qualified immunity from damages to the extent that they act within their discretionary authority and they do not violate constitutional rights clearly established at the time of the conduct in question. *See Harlow v. Fitzgerald,* 457 U.S. 800 102 S.Ct. 2727 73 L.Ed.2d 396 (1982); *Swint v. City of*

---

[4] Under Eleventh Circuit precedent, the court is not required to decide whether particular conduct actually violates a constitutional right if qualified immunity applies. In *Wright v. Whiddon,* 951 F.2d 297 (11th Cir., 1992), the court of appeals declined to decide whether the shooting of an unarmed pretrial detainee trying to escape violated the Fourth Amendment. Rather, it held simply that the law on this point was not clearly established and, therefore, the defendant was entitled to summary judgment on qualified immunity grounds. The same is true here. This court need not decide whether handcuffing a prisoner to a hitching rail violates the Eighth Amendment because the law is *not* clearly established and, hence, qualified immunity applies. *See also, Adams v. St. Lucie County Sheriff's Department,* 962 F.2d 1563, 1573 (11th Cir., 1992) (Edmondson, J., dissenting) *rev'd en banc* 998 F.2d 923 (11th Cir., 1993) (adopting Edmondson's dissent as opinion of the en banc court).

Wadley, supra. The test of qualified immunity is an objective one, focusing on whether "a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and information possessed by the official at the time the conduct occurred." *Harden v. Hayes,* 957 F.2d 845, 848 (11th Cir., 1992). To be "clearly established," the contours of right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The unlawfulness of the conduct must be apparent in light of preexistng law for it to be said that a right being violated was clearly established. That standard is objective so that it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 89 L.Ed.2d 271 (1986). Because qualified immunity is not just an immunity from damages, but also an immunity from suit, the burden of proof rest on the plaintiff to show that his right was clearly established at the time of the conduct. *See Davis v. Scherer,* 468 U.S. 183, 104 SCt. 3012, 82 L.Ed2d 139 (1984); *Adams v. St. Lucie County Sheriff's Department,* 962, F.2d 1563, 1574 (11th Cir., 1992) (Edmondson, J., dissenting) *rev'd en banc,* 998 F.2d 923 (11th Cir., 1993) (adopting Edmondson's dissent as opinion of en banc court).

The court has made a diligent search of the case law to attempt to answer the question whether handcuffing, shackling, or chaining a prisoner to a fixed object for a period of several hours violates the Eighth Amendment prohibition against cruel and unusual punishment. It was with an eye toward this question that the court requested

additional briefs from the parties, hoping to have their assistance in identifying any cases that might be said to clearly establish a rule of law in this area. Neither the court nor the parties have identified any cases, binding or otherwise in this Circuit, in which it was found that the Eighth Amendment was violated by shackling or handcuffing a prisoner to a fixed object for a significant period of time due to the prisoner's refusal to work[5]. Indeed, the few cases that involve remotely analogous fact situations have upheld the use of physical restraints or coercive measures. For example, in *Williams v. Burton,* 943 F.2d, 1572 (11th Cir., 1991), a panel of the Eleventh Circuit Court of Appeals rejected the argument that the Eighth Amendment was violated by the gagging and shackling of an inmate in four point restraints for approximately twenty-eight and one-half hours. The court reasoned that the inmate was threatening and attempting to incite violence by other inmates and that the use of the restraint, which involved shackling and handcuffing him to a bunk, was not infliction of unnecessary and wanton pain for malicious or sadistic reasons in violation of the Eighth Amendment. Similarly, in *Ort v. White,* 813 F.2d, 318 (11th Cir., 1987), the court upheld against an Eighth and Fourteenth Amendment challenge not only a correction officer's decision to withhold water from an inmate who was refusing to work on a farm detail, but also the locking of the inmate in a sallyport for several hours. There, the court held that the decision was not punitive but rather

[5] For the law to be clearly established, there must be prior decided cases with "materially similar" facts. *Adams v. St. Lucie County Sheriff's Department, supra* at 1575.

an immediately necessary coercive measure intended to compel the inmate to comply with reasonable rules and regulations.

In addition to these two reported cases from the Eleventh Circuit, the defendants have filed copies of opinions and recommendations in other cases in which inmates have been handcuffed to fixed objects for refusing to work. *See Dale v. Murphy,* (S.D. AL, Case Number 85-1091-H-S; *Williamson v. Anderson,* (M.D. AL, Case Number CV-92-H-675-N). While these opinions are unreported, they show nonetheless the absence of a *clearly* established right to be free of handcuffing to a fixed object for refusing to work. Whether or not these opinions are ultimately right on the Eighth Amendment question, they demonstrate that this particular Eighth Amendment right was not clearly established.

In this case, the plaintiff was refusing to check-out on his work detail. Defendant Gates gave him the choice of either working or being handcuffed to the security bar, plainly attempting to use an immediately necessary coercive measure to end the plaintiff's unilateral refusal to work. As in *Ort,* the danger of allowing one inmate to successfully refuse to work is its temptation to other inmates to do the same. Plainly, Sgt. Gates was acting within his discretionary authority to try to compel the plaintiff to go to work with his farm detail. Regardless of whether the actual measure of handcuffing plaintiff to a securing bar for eight hours violated the Eighth Amendment, it cannot be said that the law was so clearly established on July 6, 1993 that Sgt. Gates, the other defendants, or a reasonable corrections officer would have known that such a practice was unconstitutional.

The unlawfulness of the practice, if any, was not apparent on July 6, 1993 and, indeed, is not apparent *today.* Although it can be argued strenuously both that it is a violation of the Eighth Amendment and that it is not, that is the very essence of qualified immunity. So long as the issue is debatable, it cannot be said to be clearly established. Thus, the defendants are entitled to summary judgment on the basis of qualified immunity.

Based on the foregoing considerations, the magistrate judge **RECOMMENDS** that the motion for summary judgment filed by the Defendants in the above-styled action be **GRANTED** and that the action be **DISMISSED** with prejudice.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The clerk is DIRECTED to send a copy of this report and recommendation to the plaintiff, plaintiff's counsel and to counsel for the defendants.

DATED this 21st day of January, 1994.

/s/ T. Michael Putnam
T. MICHAEL PUTNAM,
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff, v. MARK PELZER, GENE MCCLARAN, GREG JACKSON, GARY MCGEE, JOSEPH STEPHENSON, JIM GATES A/K/A KEITH GATES, JAMES KENT, and TED LOGGINS, Defendants.	*	CIVIL ACTION NO. 96-B-2968-S

PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Mar. 20, 2000)

COMES NOW the Plaintiff and files this objection to the Magistrate Judge's Report and Recommendation entered March 10, 2000, for the reasons set forth below and in the attached Memorandum Opinion and Order in the similar case of *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00):

SUMMARY OF OBJECTION

1) The Magistrate Judge's Report and Recommendation is inconsistent with rulings in two other hitching post cases in which Middle District judges have refused to let all of the defendants out on qualified immunity. *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00) (attached hereto as Exhibit "A"); *see also Spellman v. Jones*, Case No. 98-A-529-N (M.D. Ala.) (Recommendation of 9/20/99, Order of 10/18/99), since transferred to Southern District, Case No. 99-0949-BH-M (S.D. Ala.)

2) The Magistrate Judge's Recommendation misconstrues the case law with regard to the constitutionality of applying physical restraints – such as shackling to the hitching post or some other fixed object – to an inmate who does not pose a present and immediate threat to human safety or institutional security.

LEGAL ARGUMENT

The Middle District has just released a Memorandum Opinion and Order in another case, *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00), which denied qualified immunity to correctional officers who placed an inmate on the hitching post under similar circumstances. (See copy attached hereto as Exhibit "A"); *see also Spellman v. Jones*, Case No. 98-A-529-N (M.D. Ala.) (Recommendation of 9/20/99, Order of 10/18/99), since transferred to Southern District, Case No. 99-0949-BH-M (S.D. Ala.)[1] The Magistrate Judge's Report and Recommendation in the instant case is inconsistent with the

[1] The decision denying qualified immunity in *Spellman v. Jones*, supra, was merely an order denying the motion to dismiss "at this time" which did not set forth the rationale for the Court's decision; however, in a discovery order by the same Court in yet another hitching post case, Magistrate Judge Walker opined that "it appears that the defendants are not entitled to qualified immunity with respect to the plaintiff's claims challenging the conditions of confinement to which he

qualified immunity rulings in both *Spellman* and *Fountain*, supra, and one of the reasons that the Plaintiffs in these cases are seeking class certification of all hitching post damages claims is to ensure consistent and fair results.[2] While class certification has not yet been granted, it is nonetheless paramount that the same rules apply to all of these cases.

In reaching the conclusions contained in his Report and Recommendation, the Magistrate Judge misconstrued the holding of *Williams v. Burton*, 943 F. 2d 1572, 1576 (11th Cir. 1991), *cert. den.*, 505 U.S. 1208 (1992). In *Williams*, the inmate in question had posed a clear threat to prison security by threatening to kill correctional officers and in fact spitting on one of them, and he continued to yell and make threats after being confined in his cell. On those facts, immediate restraint was necessary, and continued restraint was held to be lawful because the level of disturbance continued for a period of time after the precipitating incident. In the case at bar, however, inmate Hope was twice placed on the hitching post as a punishment for minor disturbances on a highway chain gang

---

was subjected while confined to the hitching post . . . " *Hicks v. Allen*, Case No. 96-D-854-N (M.D. Ala. 6/28/99). That analysis is consistent with her recommendation (adopted by the District Court Judge) in *Spellman* and with the exhaustive Memorandum Opinion and Order of Judge Carroll (sitting as trial judge by consent of the parties) in *Fountain v. Talley*, supra.

[2] Plaintiff's counsel represents inmates in approximately ten (10) cases involving the hitching post, and it is believed that there are approximately two hundred (200) other inmates who are entitled to bring similar claims. There is a pending motion for class certification in the case of *Fountain v. Talley*, Case No. 94-A-676-N (M.D. Ala.)

which had already subsided by time he was returned to the prison – one of which was started by another inmate and one of which was caused by an officer. (Hope Affidavit at par. 4-11) Putting Mr. Hope on the hitching post meant that he had to be transported back to the prison facility – after the altercations were over and he was no longer argumentative – which was arguably a greater disruption to prison routine than simply ordering him to resume work or sending him to his cell. In any event, there is no evidence that Mr. Hope's involvement in two off-premises incidents which he has testified were instigated by others caused any threat to safety or security, or that it created a level of disturbance among the prison population anywhere near the level of that involved in the *Williams* case. In the absence of evidence that Hope did anything to incite a riot or other such general disturbance, there was no need to restrain him on a prolonged and painful basis once the precipitating event had subsided.

In misapplying *Williams*, the Magistrate Judge tried to downplay the controlling precedents of *Gates v. Collier*, 501 F. 2d 1291, 1306 (5th Cir. 1974) and *Ort v. White*, 813 F. 2d 318 (11th Cir. 1987). In *Ort v. White*, the Eleventh Circuit approved conduct by prison officials falling far short of the abuse inflicted upon the Plaintiff in this case but nonetheless articulated the following statement of clearly established constitutional law:

> "Clearly, appellant would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison officials had summarily denied him water or imposed any other form of punishment without first affording him

> some type of disciplinary hearing. **A Fourteenth Amendment violation occurs in this context where prison officers continue to employ force or other coercive measures after the necessity for such coercive action has ceased.**"

813 F. 2d at 327 (emphasis added) In the case at bar, the Defendants did precisely what *Ort v. White* says they were not allowed to do – that is, they continued to subject him to prolonged, uncomfortable restraint under circumstances where justification for coercive measures was either wholly lacking or no longer present.

The fact that *Gates v. Collier,* supra, involved multiple issues does not dilute its precedential authority with regard to the issue applicable to this case. In *Gates,* the old Fifth Circuit held as early as 1974 that "handcuffing inmates to the fence and to cells for long periods of time . . . , and forcing inmates to stand . . . or otherwise maintain awkward positions for prolonged periods . . . run[s] afoul of the Eighth Amendment [and] offend[s] contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess". 501 F. 2d at 1306

This particular holding of *Gates v. Collier* has already been applied in the context of the hitching post, not only by Judge Carroll's Memorandum Opinion and Order attached hereto as Exhibit "A", but also by District Court Judge Thompson in *Austin v. James,* Case No. 95-T-637 (M.D. Ala. 8/10/98) – a class action filed by the Southern Poverty Law Center to obtain injunctive and declaratory relief (but not monetary damages). In *Austin,* Judge Thompson held that "as a form of corporal punishment, use of the hitching post offends contemporary standards

of decency as enunciated in *Gates.*" *Austin,* supra, Memorandum Opinion at 134, citing *Gates v. Collier,* 501 F. 2d 1291 (5th Cir. 1974) In the words of Judge Thompson, "the [C]ourt declines to find that society's standards have so devolved since the holding in *Gates* over two decades ago that use of an instrument like the hitching post would be deemed permissible." *Id.*

In considering the Magistrate Judge's Report and Recommendation, Plaintiff respectfully requests that the District Court Judge pay particular deference to the aforementioned authority, some of which was obviously not before the Magistrate Judge at the time he entered his Report and Recommendation.

CONCLUSION

For the reasons set forth in the foregoing Plaintiff's Objection to Magistrate Judge's Report and Recommendation, as well as the briefs and affidavits previously submitted by Plaintiff in opposition to summary judgment, and all exhibits thereto, Plaintiff respectfully requests that the Defendants' motion for summary judgment be denied.

This the 17 day of March, 2000.

/s/ Craig T. Jones
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(Admitted pro hac vice)

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[Certificate Of Service Omitted In Printing]

[LOGO]

STATE OF ALABAMA
DEPARTMENT OF CORRECTIONS

DON SIEGELMAN
GOVERNOR

MICHAEL W. HALEY
COMMISSIONER

October 26, 2000

Mr. Thomas K. Kahn
Clerk of the Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303

RE: Hope v. Pelzer, et al.
Appeal No. 00-12150-D

Please find attached the regulation as requested by the Court. Please let me know if I need to do anything furhter.

Sincerely,

/s/ Ellen Leonard
Ellen Leonard
Assistant General Counsel

EL/pga

Attachment

cc: Craig Jones

AFFIDAVIT

Before me, a Notary Public in and for said County and State of Alabama at Large, personally appeared John Q. Hamm, who being known to me and being by me first duly sworn, deposes and says on oath as follows:

My name is John Q. Hamm. I am the Confidential Assistant to the Commissioner of the Alabama Department of Corrections. As part of my duties, I am responsible for the Research and Monitoring Division, which maintains the Department's Administrative Regulations.

I, hereby swear and affirm that the attached document is a true and exact copy of Administrative Regulation No. 429, Refusal to Work, which was in effect in 1995.

/s/ John Q. Hamm
John Q. Hamm

SWORN TO and SUBSCRIBED before me this 26th day of October, 2000.

/s/ Paula G. Argo
NOTARY PUBLIC

My commission expires:

11/15/03

[LOGO]

STATE OF ALABAMA

DEPARTMENT OF CORRECTIONS

Research, Monitoring & Evaluation
50 Ripley St.
Montgomery, Alabama 36130

TOMMY HERRING — **COMMISSIONER**
JIM FOLSON — **GOVERNOR**

October 26, 1993

ADMINISTRATIVE REGULATION NUMBER 429 — **OPE: INSTITUTIONS**

REFUSAL TO WORK

I. GENERAL

This regulation establishes policy regarding the action to be taken when an inmate refuses to work or is otherwise disruptive to the work squad.

II. POLICY

A. It is the policy of the Department of corrections that should an inmate refuse to work or is otherwise disruptive to the work squad, departmental personnel may use such force reasonably necessary to escort the inmate to a permanently affixed restraining bar.

1. Restraining Bar: The restraining bar should be made of sturdy, nonflexible material and should be located no more than 50 feet from an officer. Each facility should have two bars – one mounted 57 inches from the ground for taller inmates and one at 45 inches for the shorter inmates.

a. Upon refusing to work, the inmate will be handcuffed to the restraining bar. Annex A to AR 429 Activity Log, will be completed when an inmate is placed on the restraining bar. If force is used to handcuff the inmate to the restraining bar, a nurse will be contacted to check the inmate's condition. If medical attention is not warranted, at the end of the day the inmate will be carried to the health care unit for a body chart. Fresh water will be available to the inmate. He will be given the opportunity to go to the bathroom once each hour. He will be fed a sack lunch at the restraining bar. At any time during the day the inmate can tell an officer that he is ready to go to work. He will be allowed to join his assigned squad for that day and begin work.

b. When an inmate refuses to work, the health care unit will be contacted to ensure that he does not have a medical stop-up restricting him from work. Inmates placed on the restraining bar that are taking prescribed medication will be given their medicine at the appropriate time at the restraining bar.

c. If the inmate remains at the restraining bar the entire day, he will be checked back into the institution after the last squad is checked in.

d. The inmate will be written a disciplinary for refusal to work.

e. Annex A, Activity log, should be completed on each inmate when he is

placed on the restraining bar. If/when the inmate returns to work, a notation should be made on the form at the time he returns to work. Appropriate entries should be made at the time the event/activity occurs, and initialed by the officer supervising the inmate at the time of the event/activity.

f. Annex A, Activity Log, will be completed on the inmate each day he is on the restraining bar. If a body chart is done on the inmate at anytime he is on the restraining bar, a copy of the body chart should be attached to the completed Annex A, Activity Log.

g. A copy of Annex A, activity log, will be attached to the incident report written on the inmate for refusing to work. A copy should also be retained in the Warden's office.

III. RESPONSIBILITIES

Wardens/Directors will ensure that any additional security measures necessary are in force to preclude escape or disruption of work activities.

IV. SUPERSESSION

This regulation supersedes Administrative Regulation 429 dated November 23, 1983.

/s/ Tommy Herring
Tommy Herring, Commissioner

Annex A Activity Log – Inmates Placed on Restraining Bar

SUMMARY OF CHARGES

To clarify and expand departmental policy when an inmate refuses to work or is otherwise disruptive to the work squad.

INSTITUTION: _____ DATE: _____

ACTIVITY LOG
**INMATES PLACED ON RESTRAINING BAR

Inmate's Name: _____ AISØ: _____

Time Inmate Restrained: _____ (AM) _____ (PM)

Reason for Restraint:

Refusing to Work
Disruptive to Work Squad (Be Specific) _____
a. Refusal to Walk in Prescribed Manner _____
b. Refusal to Carry a Tool to Job Site _____
c. Other (Be Specific) _____

_____

_____

Event/Activity Codes:

1. Meal Accepted
2. Meal Rejected
3. Fluid/Water Accepted
4. Fluid/Water Rejected
5. Restroom Break Accepted
6. Restroom Break Rejected
7. Prescribed Medications Accepted
8. Prescribed Medications Rejected
9. Checked by Health Care Unit
10. Released From Restraining Bar

RECORD EVENT/ACTIVITY CODE AND INITIAL AT ENTRY

7:00 am	_____	12:15 pm	_____
7:15 am	_____	12:30 pm	_____
7:30 am	_____	12:45 pm	_____
7:45 am	_____	1:00 pm	_____
8:00 am	_____	1:15 pm	_____
8:15 am	_____	1:30 pm	_____
8:30 am	_____	1:45 pm	_____
8:45 am	_____	2:00 pm	_____
9:00 am	_____	2:15 pm	_____
9:15 am	_____	2:30 pm	_____
9:30 am	_____	2:45 pm	_____
9:45 am	_____	3:00 pm	_____
10:00 am	_____	3:15 pm	_____
10:15 am	_____	3:30 pm	_____
10:30 am	_____	3:45 pm	_____
10:45 am	_____	4:00 pm	_____
11:00 am	_____	4:15 pm	_____
11:15 am	_____	4:30 pm	_____
11:30 am	_____	4:45 pm	_____
11:45 am	_____	5:00 pm	_____
12:00 noon	_____		

Comments: _____

_____

**Restraining Bar to be used only during daylight hours.

Annex A to AR 429

BEST AVAILABLE COPY

(3)

No. 01-309

Supreme Court, U.S.
FILED
FEB 21 2002
CLERK

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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OR CALL COLLECT (402) 342-2831

33 pp

QUESTIONS PRESENTED

1. Whether state officials sued in their individual capacities under 42 U.S.C. § 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts "materially similar" to those in the plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING BELOW

The Petitioner, Larry Hope, is an individual who was the plaintiff in the district court and the appellant in the court of appeals. The Respondents, Mark Pelzer, Gene McClaran, and Jim Gates a/k/a Keith Gates, are all individuals who were the defendants in the district court and the appellees in the court of appeals.

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The decision of the court of appeals is reported at 240 F.3d 975 (11th Cir. 2001). The decision of the district court is unreported. *See* Supp. Pet. App. 1-5.

JURISDICTION

The court of appeals entered its judgment on February 2, 2001. Pet. App. 15. A petition for rehearing was timely filed on February 22, 2001. App. 4; *see* 11th Cir. R. 40-3. The petition was denied on May 7, 2001. Pet. App. 16-17. The petition for writ of certiorari was filed on July 28, 2001, and granted on January 4, 2002. The order granting the petition was amended on January 29, 2002. Jurisdiction in this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VIII of the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. CONST. amend. VIII.

STATEMENT OF THE CASE

Larry Hope, the petitioner, was an Alabama inmate who was subjected to a painful and degrading form of corporal punishment – he was handcuffed in an awkward position to a "hitching post" for hours in the hot sun.[1] The court of appeals ruled that Hope's punishment violated the Eighth Amendment; however, the court also ruled that the respondent prison guards were entitled to qualified immunity because the facts in prior Eighth Amendment cases were not, according to the court, "'materially similar'" to the facts in Hope's case. Pet. App. 13 (citation omitted).

"Hitching posts" were horizontal metal bars to which inmates accused of certain forms of misconduct were handcuffed in Alabama prisons prior to mid-1998.[2] According to an Alabama Department of Corrections regulation in effect during the time period relevant to this case, the hitching post was intended to be used as a coercive device to compel recalcitrant inmates to work. App. 102-05; *Austin*, 15 F. Supp. 2d at 1240-43; Op. Cert. 1.

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[1] In ruling on qualified immunity, the facts must be "[t]aken as true in the light most favorable to the party asserting the injury." *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). The description of the facts presented here is drawn principally from the petitioner's affidavits and the lower courts' distillations of the record.

[2] Alabama corrections officials stopped using the hitching post after the court in *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1274 (M.D.Ala. 1998), declared that the manner in which the post had been used violated the Eighth Amendment. At the time of the *Austin* case, Alabama was the only state in the nation that used a device like the hitching post. *See id.* at 1250.

Inmates who refused to work or disrupted their work squads were to be hitched to the posts, and such inmates were to be released as soon as they agreed to go to work. App. 102-03; Op. Cert. 1. In practice, "the procedures set out [in the regulation] for determining whether to place an inmate on the hitching post were not followed." *Austin*, 15 F. Supp. 2d at 1243. Some inmates who had not refused to work or been disruptive – including inmates who "were not physically capable of working" – were handcuffed to the posts, and "inmates were not permitted to leave the hitching post after they had informed the officers that they were willing to work." *Id.* at 1243, 1245.

Hope was one of the inmates who was handcuffed to the hitching post to punish him, rather than to coerce him to return to work. In 1995, Hope was assigned to Alabama's newly-formed "chain gang" at the Limestone Correctional Facility.[3] On May 11 of that year, another inmate started an argument with Hope while they were working near an interstate highway. App. 44. Despite the fact that Hope "had neither refused to work nor encouraged other inmates not to work," *id.*, a respondent officer ordered him sent back to Limestone and placed on the hitching post. App. 9, 24. Another respondent officer handcuffed him to the post. App. 45.

Because Hope is "just slightly taller than the hitching post itself, [his] arms grew tired from being handcuffed

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[3] Despite the fact that chain gangs had had "a long, sordid history in the State of Alabama," state officials revived the practice of chaining inmates together on work squads in 1995. *Austin*, 15 F. Supp. 2d at 1215-16. After a court challenge, the state abandoned the practice the following year. *Id.* at 1217.

so high." App. 45. When he "tried moving to improve [his] circulation, the handcuffs would cut into [his] wrists and cause great pain and discomfort." *Id.* A respondent officer finally released Hope after two hours because a prison captain determined that the argument had not been Hope's fault. *Id.* at 35, 45. No hearing or disciplinary proceeding of any kind had been held before Hope was handcuffed to the hitching post in the first place.

On June 7, 1995, Hope had an altercation with guards at the work site at approximately 10:30 a.m.[4] He was placed in leg irons and transported back to the prison. App. 16-17. After being examined in the prison infirmary at approximately 11:30 a.m., Hope was handcuffed to the hitching post by one of the respondent officers. App. 46. Hope had not "refused to work or encouraged other inmates to refuse to work." Pet. App. 9. He also had not been given any kind of disciplinary hearing. App. 48.

This time, Hope was left on the hitching post for seven hours. App. 47. The officers at the post made him take off his shirt because one of them wanted to use it to clean off a van, App. 10, so Hope "remained shirtless all day while the sun beamed down and burned [his] skin." *Id.* He was deprived of water and taunted. *Id.* at 47.[5] He tried to move his arms to improve his circulation and

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[4] According to Hope, the altercation "was started by a correctional officer who had cursed [him] and grabbed [him] by the neck because [he] was sleeping on the bus on the way to a work site." App. 46.

[5] "At one time, prison guards brought a cooler of water near [Hope], let the prison dogs drink the water, and then kicked the cooler over at Hope's feet." Pet. App. 6; *see* App. 11.

relieve his pain, but the attempt "caused the cuffs to cut into [him]. By the time [he] got off the rail" after seven hours, his "wrists were swollen and bruised." *Id.* at 10.[6]

Although the respondents claimed in the court below that Hope would have been released from the post had he agreed to go to work, *see* Pet. App. 9, nothing in the record supports this claim, and the court drew the opposite inference.

> While the [Alabama Department of Corrections] claims that Hope would have been released from the hitching post had he asked to return to work, the evidence suggests that is not the case. First, Hope never refused to work. . . . Second, Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post on both occasions. Given the facts, it is improbable that had Hope said, "I want to go back to work," a prison guard would have left his post at Limestone to drive Hope back to the work site. It is more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson.

Id. at 9-10.[7]

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[6] Hope's description of his injuries was consistent with that of other inmates who testified, along with him, in the *Austin* case. *See Austin*, 15 F. Supp. 2d at 1248. The *Austin* court found that "inmates placed upon the hitching post suffered 'extreme pain, anguish, humiliation, mental suffering, and resulting physical soreness and depression.' " *Id.* at 1256 (citation omitted).

[7] This inference is consistent with the *Austin* court's finding that inmates were not taken off the hitching post even when they expressed a willingness to work. *See Austin*, 15 F. Supp. 2d at 1245.

Hope filed a *pro se* suit for damages on March 26, 1996, alleging that his Eighth Amendment rights had been violated. App. 5-11. The case was assigned to a magistrate judge who issued a report recommending that the case be dismissed on qualified immunity grounds. Supp. Pet. App. 6-33. Hope objected; however, the district court adopted the magistrate's report and accepted his recommendation. *Id.* at 1-5.

On appeal, the Eleventh Circuit held that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment." Pet. App. 11. Hope, the court ruled, easily demonstrated that the defendants' actions were wanton, thus satisfying the subjective component of the Eighth Amendment inquiry. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991). Indeed, the court found that there was "uncontested evidence of deliberate indifference" to the obvious risks of harm to Hope's health. Pet. App. 6. To buttress this conclusion, the court pointed out that the United States Department of Justice had conducted an investigation and advised Alabama officials that the hitching post posed "health and safety risks" and was being used improperly for corporal punishment purposes in Alabama prisons. Pet. App. 6-7.

The court also ruled that Hope demonstrated that he had been "denied basic human necessities" and subjected to unnecessary pain, thereby satisfying the objective component of the Eighth Amendment inquiry. Pet. App. 8; *Wilson*, 501 U.S. at 303. In reaching this conclusion, the court relied heavily upon its prior decision in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974):

> Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons. In *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), in regard to "handcuffing inmates to the fence and to cells for long periods of time" and other such punishments, we stated that "[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Gates*, 501 F.2d at 1306.

Pet. App. 8.

Despite its decision in *Gates* and its recognition that society had moved away from "forms of punishment similar to hitching posts," the court ruled that the defendants were entitled to qualified immunity. The court's reasoning is contained in the following paragraph:

> Hope argues that several of our cases, including *Gates* and *Ort [v. White*, 813 F.2d 318 (11th Cir. 1987)], established a bright-line rule against use of the hitching post. While we recognize that the inappropriateness of the hitching post could be inferred from these opinions, a bright-line rule for qualified immunity purposes "is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances." *Lassiter v. Alabama A&M Univ. Bd. of Tr.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (citations omitted). It is important to analyze the facts in these cases, and determine if they are "materially similar" to

the facts in the case in front of us. *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269-70 (11th Cir. 1996) (per curiam) (citations omitted). Though analogous, the facts in *Gates* and *Ort* are not "materially similar" to Hope's situation. In *Ort* the defendant was refused water while at a work site, until he agreed to do his job of carrying water to the work site. *Ort*, 813 F.2d at 326. *Gates* was an even more distinct case, as it involved an effort to make substantial changes based on the unconstitutional "conditions and practices in the maintenance, operation and administration" of a prison. *Gates*, 501 F.2d at 1295. We do not find that language in *Gates*, *Ort*, or any other Eleventh Circuit or Supreme Court opinion established that impermissible use of the hitching post constitutes cruel and unusual punishment clearly enough that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

Pet. App. 12-13.

SUMMARY OF ARGUMENT

The government officials involved in handcuffing the petitioner to the hitching post were not entitled to qualified immunity. The Eleventh Circuit's "materially similar facts" standard that shielded them from liability imposes an unnecessarily heavy burden on plaintiffs. To demonstrate that a government official violated "clearly established" law and is not entitled to immunity, a plaintiff must show that the rights at stake were sufficiently

"apparent" or "obvious" to give the official "fair warning" of what the law required. *See United States v. Lanier*, 520 U.S. 259, 270 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Pointing to a prior case with "materially similar facts" is one way, but not the only way, to make such a showing. Just as the Court rejected a "fundamentally similar facts" requirement in *Lanier*, so it should reject the "materially similar facts" requirement here.

No reasonable officer could have believed in 1995 that it was lawful to punish an inmate by leaving him handcuffed to a hitching post. The punishment was strikingly similar to punishment on a pillory – a barbaric practice long understood to be unconstitutional. *See, e.g., Weems v. United States*, 217 U.S. 349, 377-78 (1920). The court below should have recognized not only that the post was a modern form of the pillory; it should have recognized that handcuffing an inmate to a post as a form of punishment was no different than handcuffing an inmate to a fence, a form of corporal punishment outlawed in *Gates v. Collier*, 501 F.2d 1251, 1306 (5th Cir. 1974). Instruments of corporal punishment like the hitching post that are used to inflict "unnecessary and wanton" pain have no place in a civilized society. *See Wilson v. Seiter*, 501 U.S. 294, 297 (1991). The fact that no other state used a device like the hitching post should have been a sign to Alabama officials that the practice was wrong. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Eighth Amendment prohibits "cruel methods of punishment that are not regularly and customarily employed").

ARGUMENT

I. TO OVERCOME QUALIFIED IMMUNITY, A PLAINTIFF NEED NOT POINT TO A PRIOR CASE PRESENTING "MATERIALLY SIMILAR" FACTS

The doctrine of qualified immunity protects public officials from monetary liability when their conduct does not violate "clearly established" law. To overcome the defense of qualified immunity – to demonstrate that the law is "clearly established" – a plaintiff must show that the officials had fair warning of what the law required. One way to show fair warning is by pointing to a prior case with similar facts, but that is not the only way to do so. In some instances, a constitutional violation will be so apparent or obvious that a reasonable official should know of the unconstitutionality of his or her conduct even if the facts at issue are quite dissimilar to those in prior cases. *See, e.g., United States v. Lanier*, 520 U.S. 259, 271 (1997) (recognizing that a general constitutional rule may apply with "obvious clarity to the specific conduct in question," even though the challenged conduct has not previously been held unlawful). Because the Eleventh Circuit here required the plaintiff to identify a prior case presenting "materially similar facts" – a judicial gloss on the qualified immunity inquiry rejected by this Court in *Lanier* – the decision below cannot stand.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recognized that a suit for damages may be the only practical way to vindicate constitutional guarantees. *Id.* at 814. But the Court also recognized that permitting damage actions against government officials can entail substantial social costs, including the risk that officials will

be inhibited in the discharge of their duties by a fear of personal monetary liability and harassing litigation. *Id.* The Court has "accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damage liability, as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

There are two steps to the qualified immunity inquiry. A court must first determine whether the facts alleged, taken in the light most favorable to the plaintiff, show that the government official's conduct violated a constitutional right. If a violation can be made out, the court must then ask whether the right was clearly established. *See Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). Because the concern of the qualified immunity inquiry is to protect officials from liability for reasonable mistakes, the touchstone of the defense is whether officials have been given fair warning as to what the law requires. *See, e.g., id.* ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); *United States v. Lanier*, 520 U.S. at 270 ("the object of the 'clearly established' immunity standard is not different from that of 'fair warning' "); *Anderson v. Creighton*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

The Court has expressed concern on a number of occasions about the power of general statements of law to

provide fair warning to public officials. As a result, it has emphasized the importance of identifying the legal rules at issue with particularity. *See id.* at 640. But at the same time, the Court has warned against requiring too "extreme [a] level of factual specificity." *See Lanier*, 520 U.S. at 268. In *Lanier*, for example, a unanimous Court recognized that "general statements of the law are not inherently incapable of giving fair and clear warning." *Lanier, id.* at 271; *cf. Saucier*, 121 S.Ct. at 2157 ("This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard."). The Court made a similar point in *Anderson*, when it noted that official action is not automatically protected by qualified immunity simply because "the very action in question has [not] previously been held unlawful." *Anderson*, 483 U.S. at 640; *see also Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."). All that is required is that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

In *Lanier*, the Court unanimously rejected a gloss on the "clearly established" standard that is equivalent to the "materially similar facts" requirement that the Eleventh Circuit imposed in this case. *Lanier* involved a challenge to a state court judge's conviction under 18 U.S.C. § 242 – a civil rights statute prohibiting the deprivation of constitutional rights under color of law – for the sexual assault of five women. 520 U.S. at 261-62. The Sixth

Circuit had reversed the conviction because § 242 had never previously been held to apply to sexual assaults. According to the Sixth Circuit, criminal liability could be imposed only if the constitutional right said to have been violated had been held to apply in "a factual situation fundamentally similar to the one at bar." *Id.* at 263 (quoting *Lanier v. United States*, 73 F.3d 1380, 1393 (6th Cir. 1996)).

This Court soundly rejected the Sixth Circuit's "fundamentally similar facts" requirement. The Court acknowledged that § 242 did not "delineate the range of forbidden conduct with particularity." *Lanier*, 520 U.S. at 265. But the Court ruled that liability could still be imposed as long as the person charged had "fair warning" of what the law requires. *Id.* at 268. Although *Lanier* arose in the criminal sphere, the Court analogized the fair warning requirement to the "clearly established law" test of qualified immunity: "[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* at 270-71.

The Sixth Circuit's "fundamentally similar facts" requirement, the Court reasoned, added an unwarranted judicial gloss to the fair warning standard. *Id.* at 268. The Court noted that it had previously upheld convictions under § 242 "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 269. "[G]eneral statements of the

law," the Court explained, "are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 271. The Sixth Circuit's standard, according to the Court, created the danger that "trial judges [would] demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." *Id.* at 270.

The Eleventh Circuit's "materially similar facts" standard creates the same danger. The court below ruled that "cuffing an inmate to a hitching post past the time when he constitutes a threat to himself or others violates the 'broad and idealistic concepts of dignity, civilized standards, humanity and decency' embodied in the Eighth Amendment." Pet. App. 8 (citation omitted). As precedent for this ruling, the court pointed to its own prior decision in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), where it had used almost identical language: "handcuffing inmates to the fence and to cells for long periods of time. . . run[s] afoul of the Eighth Amendment, [and] offend[s] contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Id.* at 1306.[8] Despite the similarity between *Gates* and this case, the court below ruled that *Gates* did not "clearly establish the law" for qualified immunity purposes. Pet. App. 13 ("Though analogous, the facts in

[8] The Eleventh Circuit considers decisions by the former Fifth Circuit to be binding authority. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Gates . . . are not "materially similar" to Hope's situation.").

Like the Sixth Circuit standard rejected in *Lanier*, the Eleventh Circuit's "materially similar facts" requirement simply goes too far. The court below elevated the requirement to one of independent constitutional significance, putting the same impermissible gloss upon the "fair warning" standard that the Court rejected in *Lanier*. Rather than serving the purpose of ensuring that officials are given fair warning before being subjected to monetary liability, the Eleventh Circuit's standard turns the qualified immunity analysis into an exercise in which courts simply make factual comparisons between cases.[9]

Qualified immunity was never intended to relieve government officials from the responsibility of exercising judgment or from applying familiar legal principles to new situations. Nor should it function to give officials "one free violation" of constitutional rights every time they are asked to apply a well-established principle to a new set of facts. *See Wilson v. Seiter*, 526 U.S. at 625 (Stevens, J., concurring in part and dissenting in part). If it did, abusive prison officials could avoid liability for torturing inmates simply by varying their methods each time they were caught.

"[I]n many instances 'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications

[9] For the Eleventh Circuit, "minor variations in some facts" are often quite important. *See Marsh v. Butler County*, 268 F.3d 1014, 1032 (11th Cir. 2001).

of the right at issue on the part of government actors." *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 251 (2d Cir. 2001) (citation omitted). As the Court put it in *Lanier*, " 'the easiest cases don't even arise.' " 520 U.S. at 271 (citation omitted).

Other circuit courts have recognized that plaintiffs need not identify a closely analogous case on the facts to overcome qualified immunity; they have found it enough that the alleged constitutional violation was sufficiently obvious or clear that a reasonable official would have known of the unconstitutionality of the conduct at issue. *See, e.g., Amaechi v. West*, 237 F.3d 356, 362-63 (4th Cir. 2001) ("clearly established" rights "include[ ] not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked"); *Brokaw v. Mercer County*, 235 F.3d 1000, 1022 (7th Cir. 2000) ("[A] plaintiff need not always identify a closely analogous case; rather, he can establish a clearly established constitutional right by showing that the violation was so obvious that a reasonable person would have known of the unconstitutionality of the conduct at issue. Thus, binding precedent is not necessary to clearly establish a right."); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1251 (l0th Cir. 1999) ("We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Rather, we require parties to make reasonable applications of the prevailing law to their own circumstances."); *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) ("[T]he egregiousness and outrageousness of certain conduct may suffice to obviously

locate it within the areas proscribed by a more general constitutional rule.").

The "materially similar facts" requirement is especially inappropriate here given the level of specificity of the constitutional right at issue. The court below recognized that "the inappropriateness of the hitching post could be inferred from [its prior] opinions," but stated that "a bright line rule for qualified immunity purposes 'is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances.' " Pet. App. at 12 (citation omitted). But the problem here is with the "and so forth." The right at issue in this case – the right to be free of prolonged physical restraints used as a form of punishment – is far more specific than the requirement "to act reasonably" or "to act with probable cause." And it is far more specific than the legal standard at issue in *Lanier*. *See Lanier*, 520 U.S. at 264 (holding that statute prohibiting deprivation under color of law of "rights protected by the Constitution or laws of the United States" gave fair warning).

Of course, a requirement of "materially similar facts" might not skew the qualified immunity inquiry if the requirement were interpreted with appropriate flexibility. If courts recognize that, in some instances, factual differences between cases – no matter how numerous – may not be "material," imposing a requirement of "materially similar facts" might have few consequences. But if courts tend to interpret the requirement as calling for a certain minimum quantum of "similar facts" – and the Eleventh Circuit appears to require quite a few – then there will be cases where the requirement will impose a burden

beyond that of providing "fair warning." Because "fair warning" is all that is required to overcome qualified immunity, the Court should hold that there is no requirement that the constitutional right at issue be clearly established by a prior case presenting "materially similar facts." Fair warning, not factual equivalency, should be the focus of the qualified immunity inquiry.

II. THE UNCONSTITUTIONALITY OF USING RESTRAINTS AS PUNISHMENT WAS CLEARLY ESTABLISHED WHEN THE PETITIONER WAS HANDCUFFED TO THE HITCHING POST

The hitching post was used in this case as "a form of corporal punishment."[10] Long before the petitioner was handcuffed to the post in an awkward position and left in the hot sun, it was clearly established that such a form of punishment was unconstitutional. The pillory – long regarded as a barbarous, unconstitutional device – was an obvious parallel. And the decision in *Gates v. Collier* – outlawing a practice indistinguishable from what occurred here – should have driven the point home to any reasonable corrections officer.

The Eighth Amendment prohibits punishments that involve "the unnecessary and wanton infliction of pain." *Wilson*, 501 U.S. at 297. In determining which punishments meet this standard, the Eighth Amendment draws its meaning from "the evolving standards of decency that

[10] *Austin*, 15 F. Supp. 2d at 1258-59; *accord Fountain v. Talley*, 104 F. Supp. 2d 1345, 1351 (M.D. Ala. 2000).

mark the progress of a maturing society." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citation omitted). The infliction of pain without "penological justification" is considered to be "unnecessary and wanton." *Id.* (citations omitted).

As the court below recognized, Hope demonstrated that his constitutional rights were violated by satisfying both the subjective and objective components of the Eighth Amendment inquiry. *See* Pet. App. 5 (citing *Wilson*, 501 U.S. at 300). Hope met the subjective test by showing that the respondents were aware that placing him on the hitching post created a substantial risk of harm, yet did nothing to abate that risk. *See* Pet. App. 6. Hope met the objective test by showing that he was denied basic human necessities while on the hitching post and was subjected to various risks of harm such as physical pain, dehydration, sunburn, injury to his wrists, and harassment. *Id.* at 8. The principal question at this point is whether Hope's Eighth Amendment right, not to be treated in this manner, was clearly established at the time.

Because our society eschewed barbarous punishments long ago, this Court's Eighth Amendment jurisprudence, outside of the capital context, has addressed prison conditions, not cruel punishments.[11] The fact that

[11] *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994) (right to be protected from inmate violence); *Helling v. McKinney*, 509 U.S. 25 (1993) (right to be free from risks of harm from cigarette smoke); *Estelle v. Gamble*, 429 U.S. 97 (1976) (right to adequate medical care); *see also DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (prisoners have rights to adequate food, clothing, and shelter).

there is little case law addressing devices like the hitching post is not remarkable; the paucity of precedent on instruments that inflict corporal punishment is a direct reflection of their obvious unlawfulness. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising."). The fact that there is no case law prohibiting the caning of inmates surely does not render the propriety of such a punishment an open question under the Eighth Amendment.[12]

The "primary concern of the drafters" of the Eighth Amendment was proscribing " 'barbarous' methods of punishment." *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted); *see also id.* at 102-03 (discussing history of Eighth Amendment). In one of the few cases to address corporal punishment, the Court struck down a conviction in part because the sentence required the inmate to "always carry a chain at the ankle, hanging from the wrists . . . and [that he] be employed at hard and painful labor." *Weems v. United States*, 217 U.S. 349, 364 (1910). In its discussion of barbaric punishments, the Court noted that the "whipping post" was "certainly as odious as the pillory, and the latter has been pronounced to be within the prohibitory clause." *Id.* at 377-78; *see also Chandler v. Florida*, 449 U.S. 560, 580-81 (1981) (recognizing that "the public pillory [has been] long abandoned as a barbaric perversion of decent justice"). The fact that the comments

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[12] *Cf. Jackson v. Bishop*, 404 F.2d 571, 579-80 (8th Cir. 1968) (holding that use of a strap to whip inmates is unconstitutional corporal punishment).

about the pillory in *Weems* and *Chandler* are *dicta* simply reflects that the unconstitutionality of the punishment had long been settled, not that it is still up in the air.

The hitching post is a modern version of the pillory. Both devices require the victim to stand outdoors in an uncomfortable position with his or her wrists secured at chest-level for hours on end. *Compare* Black's Law Dictionary 1148 (6th ed. 1990) (defining pillory as "a frame erected on a pillar, and made with holes and movable boards, through which the heads and hands of criminals were put") *with* Pet. App. 6 (describing hitching post as a metal bar to which Hope was handcuffed "with his arms at approximately head level"). The pillory included an apparatus that held its victim's head in a fixed manner, and the hitching post did not. *See* Op. Cert. 16. But both devices were designed to inflict pain.

In *Austin v. Hopper*, the district court recognized that the hitching post was "a form of corporal punishment whose history can be traced to the pillory and the stocks." 15 F. Supp. 2d at 1259. The court below made a similar point: "Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons." Pet. App. 8. Given the obvious unconstitutionality of the pillory, the respondents should have known that using the hitching post as a form of punishment was unconstitutional as well. The fact that no other state used such a barbaric form of punishment, *see Austin*, 15 F. Supp. 2d at 1250, should have been another sign that it was unlawful. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Eighth Amendment prohibits "cruel methods

of punishment that are not regularly and customarily employed").

Physical restraints may certainly be used in a non-punitive manner to quell a disturbance, to restore order in exigent circumstances, or to maintain security. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (physical force may be applied in a good faith effort to maintain or restore discipline in exigent circumstances). But, as the court below found, this was not such a case. *See* Pet. App. 9-10 ("[T]here is no evidence in the record that Hope posed a continuing threat to prison safety while being transported from the work site to the prison or once he arrived at the prison itself."). "Once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments." *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991); *see also Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) ("Prison officials step over the line of constitutionally permissible conduct if they use more force than is reasonably necessary in an existing situation or if they summarily and maliciously inflict harm in retaliation for past conduct.").[13]

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[13] The Court has recognized that the prolonged use of ordinary physical restraints like handcuffs and four-point restraints may be harmful and inflict unnecessary pain. *See Washington v. Harper*, 494 U.S. 210, 226-27 (1990) ("Physical restraints are effective only in the short term, and can have serious physical side effects when used on a resisting inmate."); *see also Williams v. Benjamin*, 77 F.3d 756, 764 (4th Cir. 1996) (use of four-point restraints "undoubtedly impose a significant threat of physical injury"); *Davidson v. Flynn*, 32 F.3d 27, 30 (2d Cir. 1994) (cuffing an inmate's hands and legs too tightly caused scars and prolonged numbness); *Ferola v. Moran*, 622 F. Supp. 814, 822 (D.R.I. 1985) ("Sheer common sense tells us that immobility in such a position for a protracted period of time will cause great physical suffering and the likelihood of injury."); *Landman v. Royster*, 333 F. Supp. 621, 647-48 (E.D. Va. 1971) (chaining and handcuffing inmate to cell can cause "permanent scars . . . and prolonged physical pain" amounting to "physical torture").

The case most directly on point here is *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). In *Gates*, the former Fifth Circuit banned a form of punishment virtually identical to the hitching post. In a section of its opinion entitled "Corporal Punishment," the court of appeals found that "handcuffing inmates to the fence and to cells for long periods of time . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" runs afoul of the Eighth Amendment. *Gates*, 501 F.2d at 1306.

There is one difference between this case and *Gates*: *Gates* prohibited handcuffing inmates to fences and cells; this case concerns handcuffing inmates to horizontal metal bars. But this difference is obviously insignificant, and the court below did not appear to think otherwise. It distinguished *Gates* not on the basis of any difference between being hitched to a fence and being hitched to a post, but rather on the basis that *Gates* involved many other forms of punishment as well.[14] To put it another

---

[14] The court below stated that *Gates* was different because "it involved an effort to make substantial changes based on the unconstitutional 'conditions and practices in the maintenance, operation and administration' of a prison." Pet. App. 13 (citation omitted). The Magistrate Judge made the same point. *See* Supp. Pet. App. 22 (*Gates* "dealt with a variety of complaints about prison practices and conditions, corporal punishment among them.").

way, the problem for the court below was not that *Gates* failed to draw a bright line. It was that *Gates* drew *too many* bright lines.

But the fact that the prohibition in *Gates* was but one issue among many makes it no less controlling than if the case had concerned but a single claim. The court below did not find that *Gates'* prohibition against handcuffing inmates to fences in order to punish them was *dicta*. *See* Pet. App. 13. Nor did it find that the *Gates* holding on the point was vague or equivocal. *Id*. Indeed, *Gates* was quite unambiguous. *See Gates*, 501 F.2d at 1306 ("We have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment."). If Gates were distinguishable on the basis that it involved multiple issues, then only cases deciding a single legal issue could ever clearly establish the law.

The decision in *Gates*, this Court's recognition of the unconstitutionality of the pillory, and the case law's prohibition against corporal punishment were not the only signposts that gave the respondents fair warning. The widespread understanding of the inappropriateness of using physical restraints to punish inmates is also reflected in the standards of the corrections profession. The American Correctional Association's STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS forbid the use of physical restraints as punishment, as do the American Bar Association's STANDARDS FOR CRIMINAL JUSTICE.[15] The Court has considered "the views

[15] *See Austin*, 15 F. Supp. 2d at 1260 n.220 (quoting American Correctional Association standard that "instruments of restraint such as handcuffs, irons, and straight jackets, are never applied as punishment" and that "[c]orporal punishment should never be used under any circumstances [including] such practices as . . . handcuffing to cell doors or posts, shackling so as to enforce cramped position or to cut off circulation, standing for excessive periods"); *id*. at 1260 n.221 (quoting American Bar Association standard that "[p]ersonal restraints like handcuffs, irons, and straitjackets are to be used only if necessary to prevent individual prisoners from escaping during transfers or injuring themselves or others").

that have been expressed by respected professional organizations" in determining whether a punishment offends civilized standards of decency. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (noting the views of the American Bar Association and the American Law Institute). The Court has also found professional standards "instructive" in determining other constitutional questions involving the rights of prisoners. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (considering standards of American Correctional Association).

In summary, no reasonable officer – especially one in a circuit that included *Gates* among its precedents – could have believed in 1995 that handcuffing an inmate to a post as a form of punishment was lawful. The officers here are not entitled to qualified immunity.

CONCLUSION

For all the above reasons, the judgment of the court of appeals should be reversed.

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In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE McCLARAN, and JIM GATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Larry Hope, is an individual who was the plaintiff in the district court and the appellant in the court of appeals. The Respondents, Mark Pelzer, Gene McClaran, and Jim Gates, are all individuals who were the defendants in the district court and the appellees in the court of appeals. Contrary to the caption submitted by petitioner, Jim Gates is not the same as Keith Gates. At the time of the events relevant to this case, Jim Gates was a Lieutenant at Limestone Correctional Facility. Keith Gates was a Correctional Officer I. App. 35. Petitioner did not identify Lieutenant Gates as "Jim Gates a/k/a Keith Gates" in his complaint, referring instead to "Lut. [Lieut.] Gates." App. 7. He did not serve Officer Keith Gates with his complaint. The first time petitioner began referring to Lieutenant Gates as "Jim Gates a/k/a Keith Gates" was when his counsel appeared on his behalf and submitted his Second Affidavit. App. 43. Petitioner never moved to amend his complaint to name Keith Gates as a defendant.

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STATEMENT OF THE CASE

In 1995, respondents Sergeant Mark Pelzer, Officer Gene McClaran, and Lieutenant Jim Gates were each prison officers at Limestone Correctional Facility in Capshaw, Alabama, where petitioner Larry Hope was imprisoned. The Alabama Department of Corrections has a written policy, Regulation 429, that authorizes prison officers to handcuff inmates who refuse to work or who disrupt work crews to a "restraining bar" – a chest-high lateral pole. In May and June of 1995, respondents twice had to put Hope on the restraining bar at Limestone because he disrupted work crews. Hope alleges that these actions violated the Eighth Amendment. Pelzer, McClaran, and Gates contend that putting Hope on the bar in compliance with the safety procedures set forth in Regulation 429 did not violate the Eighth Amendment. Even if this Court rules that they did violate the Eighth Amendment, Pelzer, McClaran, and Gates contend that the law was not clearly established in 1995 and that they accordingly enjoy qualified immunity from this suit.

1. In putting Hope on the restraining bar, respondents followed Regulation 429 of the Alabama Department of Corrections (the "DOC"). Regulation 429 provided that, when an inmate "refuse[d] to work" or was "otherwise disruptive to the work squad," prison officers were authorized to "handcuff" the inmate to a "permanently affixed restraining bar." App. 102-03. (Regulation 429 did not permit "tying" the inmate to the bar, as was perhaps inadvertently suggested by the phrasing of Question 2 of the Questions Presented.)

Regulation 429 set forth a detailed list of procedures that the officers were to follow when they employed this measure. Hope has not alleged that respondents Pelzer, McClaran, or Gates ever departed from these procedures at any time during this case. App. 5-11, 43-48.

The most significant procedural requirement of Regulation 429 was that the inmate could be left on the bar only so long as he continued to refuse to work. "At any time during the day," Regulation 429 stated, "the inmate can tell an officer that he is ready to go to work." App. 103. "He will be allowed to join his assigned squad for that day and begin work." App. 103. The inmate thus held the keys to his release in his own pocket.

Before putting an inmate on the bar, moreover, officers were required to contact the health care unit to make certain that the inmate did not have a "medical stop-up" or health condition that was preventing him from working. App. 103. If the officers had been required to use force to bring the inmate to the bar, they were required to contact a nurse who would check the inmate's condition. App. 103. The restraining bar had to "be located no more than 50 feet from an officer," ensuring that an officer would always be on hand in case the inmate had a problem or indicated a willingness to return to work. App. 103.

If the inmate continued to refuse to work, Regulation 429 required prison officers to attend to the inmate's health and safety while he remained on the bar:

- "Fresh water will be available to the inmate."
- "He will be given the opportunity to go to the bathroom once each hour."

- "He will be fed a sack lunch at the restraining bar."
- "Inmates placed on the bar that are taking prescribed medication will be given their medicine at the appropriate time at the restraining bar."

App. 103.

Regulation 429 also required that the prison officers keep a detailed activity log of the time the inmate spent on the bar. App. 104. The officers were required to explain their reasons for using the restraint and to make notations when the inmate got on and off the bar; when the inmate accepted or rejected a meal; when the inmate accepted or rejected water; when the inmate accepted or rejected a restroom break; when the inmate accepted or rejected prescribed medication; and when the inmate received medical attention. App. 106. The log required the prison officers to note their observations of the inmate every fifteen minutes. App. 106.

The longest that an inmate could remain on the bar, no matter how disruptive or intransigent he may have been that day at work, was until his fellow inmates on the work squads returned to the prison. Regulation 429 required that the inmate on the bar "be checked back into the institution after the last squad is checked in." App. 103. He would also be "written a disciplinary." App. 103.

2. On May 11, 1995, at about 11:40 a.m., respondent Officer Gene McClaran was alone supervising a work crew away from Limestone Prison. Hope was part of that crew. App. 34. Hope admits that he got into a "verbal disagreement" with another inmate on the crew named

Tony Perkins. App. 9. In his incident report, Officer McClaran recounts that Hope "raised the swing blade he was working with and drew back with intentions of striking Inmate Perkins." App. 34.

Officer McClaran ordered Hope to stop, racked the slide bolt of his rifle closed, and ordered the entire work crew to get on the ground. Hope and Perkins remained standing. McClaran again ordered Hope and Perkins to get on the ground. Hope retorted: "fuck you." Finally, respondent Sergeant Mark Pelzer arrived at the scene to assist McClaran, and Hope and Perkins submitted. App. 34.

Another officer, who is not a defendant in this case, transported Hope and Perkins back to Limestone. App. 34-35. At approximately 12:20 p.m., Hope was put on the restraining bar. App. 35, 38. Hope equivocates as to which officer was the one who actually put him on the bar. In his second affidavit, he says he believes it was Sergeant Pelzer. App. 45. But the incident report appended to his affidavit identifies two other officers (not defendants in this case) as the ones who cuffed him to the bar, and he appears to defer to that report in his affidavit. App. 35, 45. Despite this equivocation, respondents will concede, for summary judgment purposes only, that Pelzer was the officer who cuffed Hope to the bar on May 11.

The activity log for May 11 shows that Hope was offered water and restroom breaks every fifteen minutes. He declined the offers on all but one occasion, when he went to the bathroom. App. 39. Temperatures that day ranged between 58 and 75 degrees. See http://www.ncdc.noaa.gov/cgi-bin/fsod_xmgr/tmp/

fsod_24228.gif. Hope asserts that his arms grew tired while on the bar and that the cuffs cut into his wrists as he changed positions. App. 45. The nurse who examined Hope later that day, however, found that he had "[n]o bruises, contusions, abrasions or lacerations" and "[n]o s/s [signs or symptoms] of trauma or illness." App. 12.

At 2:40 p.m., Officer Keith Gates (a different Gates than the Lieutenant Jim Gates who is a respondent in this case[1]) released Hope from the restraining bar and sent him back to the work crew. App. 35. Hope claims he was released after a superior officer determined that Perkins was the inmate responsible for the altercation. App. 45. Hope and Perkins later signed a "peace agreement" – an agreement to live with each other without physical conflict. App. 35.[2]

Contrary to the statement of the Eleventh Circuit (Pet. App. 9-10) and of petitioner in his principal brief (p. 3), Hope did not allege or present evidence in the district court that he told any prison officer – much less one of the respondents – that he was prepared to return peaceably to work, but was instead forced to stay on the bar. App. 5-11, 43-48.

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[1] Hope has never presented any evidence that "Officer Keith Gates" was the same person as "Lieutenant Jim Gates." See Parties to the Proceedings Below, *supra*.

[2] Without a peace agreement, the officers may have been required by DOC policy to put Hope and Perkins on an "enemy list," which would prevent them from ever being housed in the same facility while in prison. The DOC employs this measure to comply with its Eighth Amendment obligation not to put inmates in situations where they are in danger of violence by other inmates.

Most important, Hope did not allege or present evidence that Pelzer, McClaran, or Gates violated Regulation 429 in any way from the time Pelzer put him on the bar to the time he was released. He did not allege or present evidence that they denied him food, water, or a bathroom break, or that they abused him in any other way. He did not allege or present evidence that they were even in the vicinity of the restraining bar during that entire period. App. 5-11, 43-48.

3. On June 7, 1995, at approximately 10:30 a.m., Hope failed to exit the bus with his fellow inmates to begin another work crew. Hope admits that he was napping and that he did not comply when Officer Ted Loggins ordered him to get off the bus. App. 10. Hope claims that Loggins then grabbed him by the neck and that he retaliated by grabbing Loggins by the neck. App. 10. The officers who were present, however, stated that it was Hope who initially made an aggressive movement toward Loggins and attempted to grab Loggins by the neck. Pet. Supp. App. 13. In any event, several other officers had to intervene to help Loggins subdue Hope. App. 26, 30. Hope originally named Loggins and four other officers as defendants in this case and alleged that they used excessive force during this incident. App. 10. He has since voluntarily dismissed these five defendants along with his claim of excessive force. Supp. App. 9.

Following the altercation with Loggins, Sergeant Pelzer put leg irons on Hope and escorted him to Lieutenant Gates's station wagon. App. 17, 26, 30. Hope was first taken to the health care unit. App. 10. At 11:15 a.m., the nurse observed that Hope's "speech was normal," that he had a "[f]ew scattered bruises" on his left scapula and a

"[r]eddened area" on his right shoulder, but "[n]o bleeding," "[n]o knots" on his head, and no "visual disturbances." Hope was also "[a]mbulating well." A determination was made that Hope needed no medical treatment and he was released to the correctional officers. App. 13.

Lieutenant Gates then handcuffed Hope to the restraining bar. App. 46. Hope contends that other officers were present to assist Gates. App. 10. Officer McClaran may have been one of them. In his response to Hope's complaint, McClaran admitted that he "did place Inmate Hope on the Restraining Bar." App. 24. It is not clear whether McClaran was referring to the May 11 incident, when he ordered that Hope be put on the bar, or to the June 7 incident, but the magistrate judge inferred from McClaran's statement that McClaran put Hope on the bar on June 7. Pet. Supp. App. 14 n. 5.

Hope also states that one of the officers present said: "take that rag off of him. I have shit I need to clean off the van." App. 10. Hope does not claim, however, that Gates or McClaran made this remark. Hope asserts that the officers made him take off his shirt. App. 10. The pictures Hope submitted with his second affidavit, which he says were taken on June 7, show that he was not wearing his prison-issue shirt but that he was wearing another short-sleeved shirt and a cap. App. 55-57. Despite this evidence, the magistrate judge found that Hope did not have a shirt while he was on the bar on June 7. Pet. Supp. App. 14. Respondents did not object to this finding in the district court and so must be deemed to have conceded its accuracy for purposes of this petition.

Hope stayed on the bar for about seven hours. Hope says that, while on the bar, he became hot, thirsty, and sunburned. Hope also says that his arms grew tired and that his wrists swelled while he was on the bar and remained swollen for a day. App. 10, 47-48. The temperatures that day were between 64 and 87 degrees. See http://www.ncdc.noaa.gov/cgi-bin/fsod_xmgr/tmp/fsod_22614.gif.

Hope did not allege or present evidence in the district court that Pelzer, McClaran, or Gates violated Regulation 429 from the time Gates put him on the bar to the time he was released by an unnamed officer. He did not allege or present evidence that they denied him food, water, a bathroom break, or that they abused him in any other way. He did not allege or present evidence that they were even in the vicinity of the restraining bar during the entire period in question. App. 5-11, 43-48.

Contrary, again, to the statement of the Eleventh Circuit (Pet. App. 9-10) and of Hope in his opening brief (p. 3), Hope did not allege or present evidence in the district court that he told any prison officer – much less Pelzer, McClaran, or Gates – that he was ready to return to work, but that the officer instead forced him to stay on the bar. Also contrary to the statement of the Eleventh Circuit (Pet. App. 3 & n. 1, 6), Hope did not allege or present evidence that he ever asked for but was denied a bathroom break. No activity log of his time on the bar that day has been introduced into the record.

Hope admits that he received water at least once or twice while on the bar. App. 47. He states that he was

"deprived of water" for a three-hour stretch, but he does not identify the officers responsible for supplying him with water during this period. App. 47. He also alleges that two unidentified prison officers – not the respondents – taunted him by giving water to some dogs and by bringing water near him and then kicking it away. App. 47, 50; Pet. Supp. App. 26 n. 10.

4. On November 11, 1996, Hope filed a pro se complaint in the United States District Court for the Northern District of Alabama, seeking declaratory relief and damages under 42 U.S.C. 1983 for alleged violations of his constitutional rights. Hope named Sergeant Pelzer, Officers McClaran, Kent, Jackson, Loggins, Stephenson, McGee, and Lieutenant Gates as defendants. App. 7. In the affidavit attached to his complaint (App. 9), Hope alleged that Officer McClaran had "mistakenly" put him on the restraining bar on May 11, 1995, and that Officers Kent, Jackson, Loggins, Stephenson, and McGee had used excessive force against him on June 7, 1995. He made no specific allegations against either Sergeant Pelzer or Lieutenant Gates. App. 9-11.

On November 3, 1997, Hope's current counsel entered his appearance on Hope's behalf. He dropped the claim of excessive force and dismissed Loggins, Jackson, McGee, Stephenson, and Kent as defendants. He also filed a supplemental affidavit in which Hope stated that it was either Pelzer or Gates who had cuffed him to the bar on May 11, 1995, and that it was Gates who had cuffed him to the bar on June 7, 1995. App. 43-55, 45-46. Hope made no further allegations and presented no additional evidence concerning the respondents' involvement in the case.

During the two and one half years between his initial appearance and the district court's award of summary judgment, Hope's counsel did not supplement the record with any other evidence of the respondents' involvement in the case. Neither did he move to amend the complaint to add other prison officers as defendants, such as the two officers who allegedly taunted Hope and kicked his water away. In a separate class action brought to enjoin use of the restraining bar, Hope's counsel identified one of those two officers by name, yet he did not join that officer as a defendant in this case. Pet. Supp. App. 26 n. 10.

On March 10, 2000, the magistrate judge issued a Report and Recommendation that the district court grant summary judgment to the respondents. Pet. Supp. App. 6. The judge did not find that any prison officer, much less one of the respondents, had forced Hope to stay on the bar after he had expressed a willingness to go to work. The judge did not find that any prison officer, much less one of the respondents, had ever denied Hope a bathroom break while on the bar. The judge found that Hope had received water "at least once or twice" both times he was on the bar, and although the judge credited Hope's allegation that two unidentified officers had taunted him and kicked water away from him, the judge correctly noted that those officers were not Pelzer, McClaran, or Gates. Pet. Supp. App. 25-27.

The only involvement that the magistrate judge found on the part of Pelzer, McClaran, and Gates was that they had either ordered Hope be put on the bar or had cuffed him to the bar themselves. Pet. Supp. App. 12, 14. Finding no clearly established constitutional precedent

prohibiting prison officers from employing a measure like Regulation 429, the magistrate judge recommended that the district court rule that Pelzer, McClaran, and Gates enjoyed qualified immunity from Hope's Section 1983 complaint. Pet. Supp. App. 33.

Under 28 U.S.C. 636(b)(1), Hope had ten days in which to object to the magistrate judge's findings of fact; otherwise, he would be deemed to have admitted them and to have waived his right to contest those findings on appeal.[3] Hope filed an objection in which he made legal arguments against the magistrate judge's legal conclusion but did not contest any of the judge's factual findings. App. 93. On March 24, 2000, the district court issued a memorandum opinion adopting the magistrate judge's factual findings and recommendation and awarded summary judgment to the respondents. Pet. Supp. App. 1-5.

5. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's judgment on qualified immunity. The court also ruled, however, that the respondents' use of the restraining bar was cruel and

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[3] This Court has held that the courts of appeals may adopt standards, including standards that limit appeals, for cases in which the district court adopts the recommendations of a magistrate judge. *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985). The Eleventh Circuit has held that the failure to object, after notice, to the magistrate's factual findings precludes later attack on those findings. *Lewis* v. *Smith*, 855 F.2d 736 (11th Cir. 1988); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); see also *Thomas* v. *Arn*, 474 U.S. at 146 n. 4. When a court of appeals has adopted such a rule and a party fails to object to the facts or conclusions of law found by a magistrate judge, he has waived those issues on appeal in that circuit. *Thomas* v. *Arn*, 474 U.S. at 150.

unusual punishment under the Eighth Amendment. In so ruling, the court made a number of factual suppositions it was not entitled to make.

First, the court of appeals found that, on both May 11 and June 7, 1995, the prison officers violated Regulation 429 by leaving Hope on the bar when he was willing to go back to work. Pet. App. 9-10. The magistrate judge never made any such finding, and Hope waived his right to press this issue on appeal when his counsel failed to object to the magistrate judge's factual findings in the district court.

Even if Hope did not waive the issue, the summary judgment record does not support the court of appeals' finding that the prison officers violated Regulation 429. The only allegation or evidence Hope has ever given about his disposition toward work in this case is the following statement about the May 11 incident: "I had neither refused to work nor encouraged other inmates not to work at the time of that incident." App. 44. Hope may not have refused to work or encouraged other inmates not to work, but he was "disruptive to the work squad" under Regulation 429 when he forced Officer McClaran to train a rifle on him in order to prevent him from striking a fellow inmate with a swing blade. App. 34. He was also "disruptive to the work squad" on June 7, by failing to exit the work bus when ordered and by getting into an altercation with several prison officers. App. 10, 102.

Furthermore, Hope has never alleged that once he was on the bar he told any prison officer, much less one

of the respondents, that he was prepared to return peaceably to work. App. 5-11, 43-48. Nonetheless, the court of appeals found it "improbable that had Hope said, 'I want to go back to work,' a prison guard would have left his post at Limestone to drive Hope back to the work site." Pet. App. 10. The court said it was "more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson." Pet. App. 10. The court of appeals had no record basis or procedural warrant to engage in such speculation.

Second, the court of appeals found that Hope "was given no bathroom breaks" on June 7, 1995. Pet. App. 3 & n. 1. Hope, however, never even made such an allegation, either in his pro se complaint or in the second affidavit he filed with the assistance of counsel. In addition, the record contains no activity log of Hope's time on the bar on June 7. The court of appeals implied, without any record support, that respondents were somehow responsible for this omission, and then asserted that the absence of the activity log meant that "Hope's allegations about the lack of . . . bathroom breaks [we]re uncontested." Pet. App. 3 n. 1. As the plaintiff, Hope bore the burden of alleging and adducing evidence that he was denied a bathroom break. Respondents cannot be held liable for failing to contest allegations that Hope never made.

What evidence there is in the record points to the opposite conclusion – that Hope was not denied a bathroom break. Regulation 429 entitled Hope to hourly restroom breaks. App. 103. The activity log for May 11 shows that the officers offered him restroom breaks every fifteen minutes. App. 39. In the absence of even a scintilla of evidence to the contrary, it must be assumed that the

prison officers complied with prison policy, treated Hope as they had in the past, and permitted him to use the bathroom.

Third, the court of appeals saddled respondents with responsibility for every wrongful act alleged on the part of any prison officer in the case. The court's use of passive voice in its description of facts (e.g., Pet. App. 2-3) and in its statement of conclusions (e.g., Pet. App. 4 ("Hope's Constitutional Rights Were Violated")) enabled it to elide the fact that Hope never alleged that Pelzer, McClaran, and Gates did anything other than initially put Hope on the restraining bar. The court did not limit its constitutional analysis to respondents' alleged involvement. The court chronicled every misdeed alleged by Hope (and some not alleged by Hope) in the course of making its constitutional ruling. The court even charged respondents – low-ranking officers without law degrees or involvement in the making of DOC policy – with constructive awareness of a 1994 U.S. Department of Justice (DOJ) report opining that the restraining bar was unconstitutional. Pet. App. 6.

Petitioner and his amici have used a similar tactic, citing findings from other cases brought against different defendants concerning use of the restraining bar. See, e.g., Brief for the United States 3-4. In particular, they cite the opinion in *Austin* v. *Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998), a class action brought against the Commissioner of the Alabama DOC to enjoin a number of practices, including use of the restraining bar. The *Austin* opinion is a preliminary ruling, not a final judgment that the Commissioner has had an opportunity to appeal. The district court has stayed the case and will not issue final

judgment until after this case. The court's findings, moreover, are general, describing an aggregate of alleged abuses on the part of unnamed prison officers throughout the state. The court does recount the June 7, 1995 incident involving Larry Hope, but discusses only the allegations made against the unnamed officers – again, not the respondents – who allegedly taunted Hope while he was on the bar and denied him water. Those findings cannot be attributed to respondents, much less have preclusive effect against respondents under any theory of collateral estoppel.

6. In the eight Section 1983 cases that counsel have been able to find in which an inmate sued an Alabama prison officer for handcuffing him to a stationary object for refusing to work, the district courts held that the restraint did not violate the Eighth Amendment. Four of these involved use of the restraining bar. *Dale* v. *Murphy*, No. CV-85-1091-H-S (S.D. Ala. 1986) (light pole); *Williamson* v. *Anderson*, No. CV-92-H-675-N (M.D. Ala. 1993) (fence); *Hollis* v. *Folsom*, No. CV-94-T-0052-N (M.D. Ala. 1994) (fence); *Vinson* v. *Thompson*, No. CV-94-A-268-N (M.D. Ala. 1994) (restraining bar); *Ashby* v. *Dees*, No. CV-94-U-0605-NE (N.D. Ala. 1994) (fence); *Lane* v. *Findley*, No. CV-93-C-1741-S (N.D. Ala. 1994) (restraining bar); *Kimble* v. *Hightower*, No. CV-95-B-1328-S (N.D. Ala. 1996) (restraining bar); *Johnston* v. *Hopper*, No. CV-97-N-937-NE (N.D. Ala. 1998) (restraining bar; Gates was a co-defendant). In one other case involving the restraining bar, the district court dismissed the complaint on qualified immunity grounds. *Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala. 1994).

The only case of which counsel are aware (prior to this one) in which a court has held that use of the restraining bar was unconstitutional was the class action in *Austin* v. *Hopper*. *Austin* was decided in 1998, three years after the events in this case, not in 1995, as suggested by the ACLU in its brief (pp. 1, 22-24). The *Austin* court did not rule, moreover, that the restraining bar or Regulation 429 was unconstitutional per se. Rather, the problem the court found was that many Alabama prison officers were not using the restraining bar in accordance with Regulation 429: e.g., by denying inmates water while on the bar, by putting prisoners on the bar for actions that did not constitute a refusal to work or a disruption of the work crew, by not first checking whether the inmate had a medical stop-up. 15 F. Supp. 2d at 1239-48. The court gave the DOC Commissioner the opportunity to revise its restraining bar policy to include procedural safeguards to ensure that prison officers would use the bar in the manner that Regulation 429 already required. The Commissioner has done so, filing an extensive revised policy that proposes, inter alia, to install surveillance cameras to monitor how the officers treat inmates on the post. The Commissioner awaits a decision on that policy by the district court, which, as noted, has stayed the case pending resolution of *Hope* v. *Pelzer*. Until the district court rules on the revised policy in *Austin*, the court has directed the Commissioner to halt use of the restraining bar in Alabama prisons. 15 F. Supp.2d at 1273.

SUMMARY OF ARGUMENT

1. Respondents Pelzer, McClaran, and Gates did not subject petitioner Hope to cruel and unusual punishment by putting him on the restraining bar in compliance with Regulation 429. To prevail on his Eighth Amendment conditions-of-confinement claim, Hope must show that respondents acted with "deliberate indifference" to his health and safety, and that they denied him the "minimal civilized measure of life's necessities." All that Pelzer, McClaran, and Gates are alleged to have done in this case is twice put Hope on the restraining bar because he disrupted work crews. In doing so, they followed Alabama Department of Corrections Regulation 429. Hope has not alleged that they departed from Regulation 429 in any way. Under Regulation 429, Hope was entitled to food, water, bathroom breaks, and medical attention while on the bar. He was under constant supervision. At any time, if he agreed to return to work without disruption, he could get off the bar. These circumstances establish neither the subjective nor the objective prong of the test for whether a condition of confinement violates the Eighth Amendment.

2. Even if it turns out that Pelzer, McClaran, and Gates did violate the Eighth Amendment, they did not violate a right that was "clearly established" at the time of the events in this case, so as to overcome their qualified immunity. To be "clearly established," a constitutional or statutory right must either be obvious from the text or arise from judicial precedent that is "materially similar" to the case at hand. Material similarity is a workable and flexible standard of comparison that ensures a public official has fair warning of his or her

legal responsibilities in a particular situation. The more fact-intensive the governing legal standard, the more similarity is required between the present case and a past one, in order to defeat the public official's qualified immunity. The conditions-of-confinement test is a very fact-intensive standard. Hope thus must demonstrate a high degree of similarity between his allegations in this case and the facts of a prior case holding that a condition of confinement violated the Eighth Amendment.

Far from making clear that use of the restraining bar in accordance with Regulation 429 violated the Eighth Amendment, the relevant case law in 1995 indicated that it was constitutional. The Eleventh Circuit and other courts of appeals have refused to find Eighth Amendment violations or have awarded qualified immunity in a number of prison cases presenting conditions of physical restraint more prolonged and more severe than Hope faced by being on the restraining bar. In six pre-1995 Section 1983 cases that counsel has been able to locate in which an inmate sued an Alabama prison officer for handcuffing him to a stationary object, the district courts held that the restraint did not violate the Eighth Amendment. Two of these cases involved use of the restraining bar. Especially because Pelzer, McClaran, and Gates were following a DOC policy that authorized them to use the restraining bar in the manner that they did, they are entitled to qualified immunity from this lawsuit.

3. This Court should not remand for discovery. Petitioner's counsel has had two and a half years to discover facts and make more specific allegations against respondents. One of the purposes of qualified immunity is to dispose of cases at an early stage, so as to minimize the

expense and chilling effect that litigation poses to public officials. That purpose would be defeated if Hope were given even more time to engage in discovery.

ARGUMENT

I. Pelzer, McClaran, and Gates Did Not Violate the Eighth Amendment by Putting Hope on the Restraining Bar in Accordance With Regulation 429.

This Court granted the petition for writ of certiorari on two questions, both related to whether respondents Pelzer, McClaran, and Gates enjoy qualified immunity from petitioner's Section 1983 suit. Last Term in *Saucier* v. *Katz*, however, this Court made clear that, in Section 1983 cases, the question of constitutionality must be addressed before the question of qualified immunity. This Court framed the inquiry as follows: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 121 S. Ct. 2151, 2156 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*

Hope asserts that the respondent prison officers subjected him to cruel and unusual punishment by putting him on the restraining bar. "[I]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge," however, and is instead alleged to result from a condition of confinement, "some mental element must be attributed to the inflicting officer before it can qualify" as an Eighth Amendment violation. *Wilson*

v. *Seiter*, 501 U.S. 294, 300 (1991). Hope thus must show not only that Pelzer, McClaran, and Gates inflicted pain that was "sufficiently serious," but also that they exhibited "deliberate indifference" to his health and safety. *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994) (quotations omitted); *Wilson*, 501 U.S. at 303; *Estelle* v. *Gamble*, 429 U.S. 97, 105-06 (1976) (inadvertent failure to provide medical care to inmate not cruel and unusual).

Pelzer's only alleged involvement in this case is that he transported Hope back to the prison on May 11, 1995, and may also have put Hope on the bar that day. McClaran's only alleged involvement in this case is that he ordered Hope be put on the bar on May 11; he may also have helped put Hope on the bar on June 7, 1995. Gates's only alleged involvement is that he helped put Hope on the bar on June 7. The sum total of these allegations is that respondents put Hope on the bar twice but had nothing to do with him thereafter. The mere act of putting Hope on the bar – in compliance with DOC policy and on the assumption that he would remain on the bar only so long as he refused to comply with his obligation to work – does not constitute a violation of either the subjective or the objective prong of the *Farmer/Wilson* test.

A. Pelzer, McClaran, and Gates did not act with "deliberate indifference" to Hope's health and safety by putting him on the restraining bar in accordance with Regulation 429.

Farmer v. *Brennan* made clear that the standard for "deliberate indifference" is "subjective recklessness as

used in the criminal law." 511 U.S. at 839. This means that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Id.*

The record is devoid of evidence that Pelzer, McClaran, or Gates had the necessary awareness or drew the required inference. Petitioner asserts that the restraining bar exposed him to the risks of pain, dehydration, sunburn, wrist injury, and harassment. Pet. Br. 19. Putting Hope on the bar in the manner prescribed by Regulation 429 exposed him, at best, to a marginal risk that these events would come to pass. Compare *Fuentes* v. *Wagner*, 206 F.3d 335, 340 (3rd Cir. 2000) (strapping inmate to chair for eight hours in accordance with prison policy, causing "loss of feeling in his hands and feet, cuts on his wrists and ankles where he had been handcuffed and shackled, leg cramps, discomfort in his arms, restricted breathing, and back pain," did not constitute deliberate indifference).

Both times Pelzer, McClaran, or Gates put Hope on the bar, a nurse checked Hope's medical condition first. Other prison officers were on hand to watch Hope once he was on the bar. Pelzer, McClaran, and Gates had no reason to assume that these officers would not provide him with food, water, bathroom breaks, and everything else required by Regulation 429. They had no reason to believe that Hope would not be permitted to leave the bar as soon as he agreed to return peaceably to work. Most of

all, they had no reason to anticipate the alleged failure of the other officers to provide Hope with water during one three-hour stretch, or the alleged harassment of Hope by the two officers who kicked his water away and gave it to the dogs. Under these conditions, the risks to Hope of pain, dehydration, sunburn, wrist injury, and harassment were hardly greater and perhaps even less than that faced by his fellow inmates who dutifully worked in the sun all day.

In stretching to find evidence of deliberate indifference on the part of respondents, the court of appeals took judicial notice of a DOJ report to the Governor of Alabama, regarding the use of the restraining bar at Easterling Correctional Facility in southern Alabama. Pet. App. 6. The Alabama DOC replied to DOJ, acknowledging that if used improperly, the restraining bar could threaten inmate health and safety, but maintaining that the procedures set forth in Regulation 429 negated that threat. *Austin*, 15 F. Supp. 2d at 1249. The court of appeals held that "this exchange between the DOJ and the DOC demonstrates that the DOC was aware of the substantial risk of harm created by the use of the hitching post for prolonged periods of time." Pet. App. 7.

Even if awareness of risk could be imputed to DOC from a non-binding legal opinion with which it pointedly and reasonably disagreed, it is beyond comprehension that such awareness could in turn be imputed to respondents. Pelzer, McClaran, and Gates worked at Limestone Facility in northern Alabama, over 260 miles away from the Easterling Facility that DOJ inspected. They were low-ranking officers, whose job descriptions required no more than a high school degree, and their input into DOC

policy-making would have been minimal at best. That they would have known anything about the DOJ report is rank speculation.

B. Pelzer, McClaran, and Gates did not deny Hope the "minimal civilized measure of life's necessities" by putting him on the restraining bar in accordance with Regulation 429.

"Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' extreme deprivations are required to make out a conditions-of-confinement claim." *Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992) (excessive force against prisoner may be cruel and unusual if it inflicts wanton and unnecessary pain though no serious injury) (quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981) (double-bunking of inmates in single-occupancy cells not cruel and unusual)). "[O]nly those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Hudson*, 503 U.S. at 9 (quoting *Rhodes*, 452 U.S. at 347). This proposition "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (cruel and unusual to require denationalization of certain wartime deserters). "Today the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime." *Rhodes*, 452 U.S. at 346 (citations omitted).

1. "Outside the context of capital punishment, successful challenges to the proportionality of particular

sentences have been exceedingly rare." *Rummel* v. *Estelle*, 445 U.S. 272 (1980) (mandatory life sentence under recidivism statute for obtaining $120.75 by false pretenses not cruel and unusual). The principle "does not require strict proportionality between crime and sentence" but forbids only "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ.) (upholding sentence to life without parole for conviction of possession of more than 650 grams of cocaine). Assuming that the proportionality requirement applies to discipline imposed for violation of internal prison procedure, it is difficult to imagine a measure more proportionate than one that the prisoner can terminate at his own initiative simply by agreeing to do what he was supposed to be doing in the first place. In addition, the temporary discomfort of being cuffed to a bar was not out of proportion to Hope's misdeeds in this case.

2. The real question, then, is whether use of the restraining bar as prescribed by Regulation 429 inflicts "unnecessary and wanton infliction of pain." Hope and amicus American Civil Liberties Union (ACLU) contend that the restraining bar is a modern-day pillory. This is a nice sound bite but a specious legal and historical analogy. The pillory was a horizontal, split, wooden frame with holes holding the hands level with and parallel to the neck in a locked, forward position. It was used to stretch the neck, permit the prisoner's ears to be nailed to the board, or otherwise subject the prisoner to public humiliation. See http://www.getchwood.com/

punishments/curious/chapter-4.html; http://onlinedictionary.datasegment.com/word/Pillory. It was a truly "unusual" form of punishment that would likely be deemed "cruel" as well under any conceivable conditions of modern use. The restraining bar, by contrast, consists of a pair of handcuffs and a chest-high horizontal post. "Handcuffs, shackles and irons are not per se unconstitutional." ACLU Br. 20. Even the court of appeals agreed that the restraining bar could be used "for a period of time" in order "to quell a threat or restore order." Pet. App. 11. The same cannot be said of the pillory.

Turning to modern precedent, the ACLU suggests that "prolonged physical restraint" violates the Eighth Amendment in two circumstances: (1) when "movement is denied" and "the health of the individual is threatened," Br. 20 (quoting *French* v. *Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985)); or (2) when the restraint "could [not] plausibly have been thought necessary" to achieve some legitimate penological interest. Br. 20-21 (quoting *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986)). Respondents do not quarrel with this basic legal framework, but simply point out that neither circumstance was present in this case.

First, Pelzer, McClaran, and Gates did not immobilize Hope or leave him in a contorted position that in any way threatened his health. He could move his head, his shoulders, his torso, his legs, and most of his arms. He was able to stand fully erect and lean his shoulders against the bar to take some pressure off the muscles in his arms and chest. The second time he was on the bar, he was cuffed to the vertical pole at the end of the restraining

bar, against which he could lean his entire body. App. 55. Hope was also permitted bathroom breaks, during which he was able to move about and stretch, and he could get off the bar any time he agreed to return to work. Even the bad acts alleged on the part of the other non-defendant officers – while inexcusable and clearly a violation of Regulation 429 – did not subject Hope to a great health risk. Hope alleges that the other officers deprived him of water for at most three hours, leaving him "thirsty" but not by his account dehydrated or faint. App. 11, 47. In fact, the only injuries that Hope contends he actually suffered that day were sunburn and sore wrists that "appeared to be bruised" and remained swollen for a day thereafter. App. 48, 50. These pains are not dissimilar in kind or in degree to those likely suffered by his fellow inmates who did go cooperatively to work.

The ACLU's cases, and others, establish that a far more debilitating and health-threatening form of restraint is necessary to violate the Eighth Amendment. In *French*, the Seventh Circuit rejected a prisoner's claim that lack of regular exercise violated the Eighth Amendment and indicated that prison officials would have to restrain a prisoner's movement to the point that his muscles were "allowed to atrophy" in order to violate the Eighth Amendment. 777 F.2d at 1255. In *Wells* v. *Franzen*, the Seventh Circuit held that shackling a prisoner by his four limbs to a bed for nine days straight, without bathroom breaks or regular access to water, did not violate the Eighth Amendment. 777 F.2d 1258, 1260-61, 1264. The court characterized the plaintiff's complaints of abrasions, bruises, and restricted blood flow as "minor discomfort" that did not establish an Eighth Amendment

violation of "wanton infliction of pain" by officials. *Id.* at 1264. In *Key* v. *McKinney*, the Eighth Circuit held that putting an inmate in handcuffs and leg shackles for twenty-four hours for throwing water on an officer did not violate the Eighth Amendment. 176 F.3d 1083, 1086 (8th Cir. 1999). And in *Hartsfield* v. *Vidor*, the Sixth Circuit held that restraining a prisoner to a bed for two eight-hour periods, during which time he was denied fresh water or bathroom breaks and was forced to sit in his own urine, did "not fall below the minimal standards of civilized society." 199 F.3d 305, 309-10 (1999) (citing *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994)).

The Eleventh Circuit has also rejected claims of prolonged physical restraint involving far harsher conditions than those alleged by Hope, although in a slightly different legal context – allegations of excessive force in violation of the Eighth Amendment. In these cases, officers had to restrain prisoners to prevent them from hurting themselves or others. In *Campbell* v. *Sikes*, the Eleventh Circuit held that leaving a mentally disturbed prisoner in an L-shaped restraint for periods of 27, 1½, 5, 16, and 66½ hours did not violate the Eighth Amendment. 169 F.3d 1353, 1375-78 (1999). And in *Williams* v. *Burton*, the Eleventh Circuit held that gagging and binding a violent prisoner in four-point restraints for twenty-eight consecutive hours did not violate the Eighth Amendment. 943 F.2d 1572, 1574 (1991).

To be sure, Hope was uncomfortable on the restraining bar and became more uncomfortable the longer he refused to work. But that was the whole point of the exercise: to induce Hope to return peaceably to work. Unlike the cases above, Hope held the keys to his release

in his own pocket, and the maximum time he could have spent on the bar for refusing to work was a single work day. The Eighth Amendment "does not mandate comfortable prisons," *Rhodes*, 452 U.S. at 349 – and permits prison conditions that are "restrictive and even harsh," *Farmer* v. *Brennan*, 511 U.S. at 833 (quoting *Rhodes*, 452 U.S. at 347) – especially when the inmate can remove the source of his discomfort just by complying with his obligation to work.

Second, the restraining bar has ample penological justification. This Court has acknowledged "rehabilitation" as well as "internal security" as valid penological objectives. *Pell* v. *Procunier*, 417 U.S. 817, 822-23 (1974). Work squads are an important part of the rehabilitative program of the Alabama correctional system, and the restraining bar is an effective means of impelling inmates to work. Officers cannot just return unruly inmates to the prison. That would in effect reward the inmates for their misbehavior by giving them the day off. Officers also cannot segregate every inmate who disrupts a work crew, because Alabama prisons are filled to capacity and do not have many spare cells. Segregation cells also pose independent constitutional problems. *Hutto* v. *Finney*, 437 U.S. 678, 687 (1978) (leaving prisoners in segregated cells for extended periods of time was cruel and unusual). Officers may charge inmates with rule violations – resulting in the potential loss of privileges such as store and telephone use, visitation, and good-time credit – but not all inmates earn those privileges. Furthermore, these charges require due process hearings and are not a quick solution to the immediate concerns of restoring discipline and showing other inmates that cooperation is required on work squads.

Petitioner and the ACLU urge this Court to give constitutional weight to the opinions of their experts condemning the use of the restraining bar. While the opinions of experts may be instructive in some areas, "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Rhodes*, 452 U.S. at 348 n. 13 (quotation omitted). Petitioner and the ACLU also urge this Court to give weight to the fact that Alabama is the only state currently using the restraining bar. They do not show, however, whether other states have considered and rejected use of the bar or whether other states once used the bar but now do not. Compare *Ford* v. *Wainwright*, 477 U.S. 399, 408 n. 2 (1986) (noting that twenty-six states had enacted statutes explicitly forbidding execution of insane); *Thompson* v. *Oklahoma*, 487 U.S. 815, 829 & n. 30 (1988) (observing that eighteen states had enacted statutes explicitly establishing minimum age for capital punishment). "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282. "Diversity not only in policy, but in the means of implementing policy, is the very *raison d'etre* of our federal system." *Harmelin*, 501 U.S. at 990 (Scalia, J., joined by Rehnquist, C.J.). See also *Harris* v. *Thigpen*, 941 F.2d 1495, 1517 (11th Cir. 1991) (upholding Alabama practice of segregating all inmates with AIDS against constitutional challenge, when Alabama was the only state following that practice).

This Court has acknowledged that "the problems that arise in the day-to-day operation of a corrections facility

are not susceptible of easy solutions." *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979) (double-bunking of inmates in single-occupancy cells did not violate due process).

> Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. . . . [J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Id. at 547-48 (citations omitted). Respondents urge this Court not to assume that their superiors in the Alabama Department of Corrections are insensitive to the values that animate the Eighth Amendment "or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system." *Rhodes*, 452 U.S. at 352. This Court has repeatedly admonished that cases such as this one pose questions regarding constitutional requirements, and that this Court should provide judicial answers to those hard questions rather than judicial opinions as to how best to operate prisons.

Id. at 351; *Whitley* v. *Albers*, 475 U.S. 312, 321-22 (1986) (shooting prisoner while quelling riot without prior verbal warning was not cruel and unusual); *Bell* v. *Wolfish*, 441 U.S. at 539.

The teaching of this Court's conditions-of-confinement jurisprudence is that no part of prison life is ideal, nor can it be. In the judgment of the Alabama Department of Corrections, use of the restraining bar as prescribed in Regulation 429 was a cost-effective, safe and relatively pain-free way to impel inmates to work. Pelzer, McClaran, and Gates did not offend "evolving standards of decency" by deferring to the judgment of their employer and putting Hope on the bar in accordance with Regulation 429.

II. Even If This Court Determines That Pelzer, McClaran, and Gates Violated the Eighth Amendment by Putting Hope on the Restraining Bar, They Are Entitled to Qualified Immunity from This Suit.

Respondents Pelzer, McClaran, and Gates did not violate Hope's "clearly established" rights. They could not have been reasonably expected to anticipate that putting him on the restraining bar – in compliance with an administrative regulation that afforded Hope food, water, bathroom breaks, and medical attention and that allowed Hope to determine for himself when he would be released – constituted a violation of the Eighth Amendment. Prison officers could not do their jobs if every action they took in accordance with department procedure were subject to that kind of doubt. Respondents are accordingly entitled to qualified immunity from this lawsuit.

A. "Material similarity" is a workable and flexible standard that advances the purposes of this Court's qualified immunity doctrine.

The first question this Court directed the parties to address is whether state officials "are entitled to qualified immunity unless they have violated statutory or constitutional rights 'clearly established' by a case presenting facts 'materially similar' to those in the plaintiff's case." Except for extreme cases, in which the right violated is readily apparent without the aid of judicial precedent, respondents submit that the question should be answered in the affirmative. The requirement of "material similarity" gives public officials the necessary elbow room to perform their duties zealously. It protects them from the expenses of litigation, keeps their energy focused on pressing public issues, and diminishes the chilling effect of the threat of lawsuits on people's willingness to seek public office. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). At the same time, it affords a needed measure of discipline when an official takes action "not distinguishable in a fair way" from other action that has been declared unlawful by a court. *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001).

Qualified immunity doctrine requires that questions of constitutional law be viewed from the perspective of the "reasonable official." *Saucier*, 121 S. Ct. at 2156; see also *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Were it otherwise, liability could not be calibrated to the proper level of deterrence – "encouraging the vigorous exercise of official authority," *Butz* v. *Economou*, 438 U.S. 478, 506 (1978), while at the same time discouraging violations of individual rights. To be effective, the doctrine must

enable government officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson*, 483 U.S. at 646 (quotations omitted).

"The relevant, dispositive inquiry," therefore, "in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 121 S. Ct. at 2156. When the right is clearly established, holding public officials personally liable for violations of that right has adequate deterrent effect. When it is not clearly established, holding officials personally liable for violations of the right would over-deter and discourage the "principled and fearless decision-making" that is desired of public officials. *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975); See also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). This is especially true in the prison context, where public officials "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication" of their responsibilities. *Scheuer* v. *Rhodes*, 416 U.S. 232, 246 (1974). This Court has thus declared that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986).

"Material similarity" is a workable and flexible standard that vindicates these purposes. The requirement of "similarity" between past cases and the present ensures that the public official receives warning of his or her legal responsibility. The requirement of "materiality" fine-tunes the necessary element of similarity to ensure that the warning is "fair" without requiring the sort of precise

factual identity that would render Section 1983 meaningless. *Saucier*, 121 S. Ct. at 2157 (qualified immunity available unless facts are "not distinguishable in a fair way" from the facts of a previous case); cf. *United States* v. *Lanier*, 520 U.S. 259, 265-67 (1997). As required by qualified immunity doctrine, it answers the question "how much similarity is required" from the perspective of the public official, pegging the degree of similarity required to the ability of the "reasonable official" to detect that similarity in the immediate circumstances with which he or she is presented. In this sense, the concept of material similarity in qualified immunity doctrine may draw helpful meaning from the well-developed concept of material misrepresentation in federal securities law, which answers the question "how much misrepresentation is required" from the perspective of the reasonable investor. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-32 (1988); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 153-54 (1972). Habeas jurisprudence, as suggested by amici Missouri et al., may also provide significant guidance.

Their stated positions notwithstanding, petitioner and his amici all advocate some sort of material similarity standard. Indeed, petitioner concedes that a requirement of material similarity "might not skew the qualified immunity inquiry if the requirement were interpreted with appropriate flexibility." Br. 17. Petitioner and the ACLU's disagreement with the Eleventh Circuit's material similarity standard is not one of kind but of degree. They purport to draw but one principled distinction between their standard and that of the Eleventh Circuit.

They charge that the Eleventh Circuit uses material similarity to avoid granting immunity in cases with outrageous facts like *United States* v. *Lanier*, where the rights violation is so blatant it need not correspond to the facts of a particular judicial precedent in order to be chargeable to the defendant public official. 520 U.S. 259 (state judge prosecuted under 18 U.S.C. 242 for sexually assaulting several women in his chambers).

Respondents submit that petitioner and his amici, especially the ACLU, have created a straw man in their characterization of Eleventh Circuit precedent on material similarity. The Eleventh Circuit acknowledges, and respondents readily concede, that a rights violation may sometimes be so plain that material similarity to a prior case is unnecessary to defeat immunity. Public officials are charged with knowledge not just of decisional law but of constitutional and statutory text as well. To use an example close to home, prison officers are as likely to be familiar with the constitutional phrase "Cruel and Unusual Punishment" as they are with the facts of any given Eighth Amendment case. "Occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law." *Lassiter* v. *Alabama A&M University*, 28 F.3d 1146, 1150 n. 4 (11th Cir. 1994). In extreme cases, an official may stray " 'so far beyond the hazy border' between constitutional and unconstitutional conduct" that the official "had to know he was violating the Constitution even without case law on point." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926

(11th Cir. 2000) (quoting *Smith* v. *Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)).

In most Section 1983 cases, however, the right claimed does not spring obviously from the constitutional or statutory text, and the question whether the right exists is not one that can be answered without the aid of judicial elaboration. A plaintiff who seeks to defeat qualified immunity in such cases cannot just allege violation of an "abstract" or "general right", but must show that the constitutional right he asserts was clearly established in a "particularized, and hence more relevant, sense." *Anderson* v. *Creighton*, 483 U.S. 635, 639-40 (1987). The issue, then, is the degree of similarity that is required between past and current cases. That is the issue addressed by the concept of materiality.

The requirement of materiality means that, the more fact-intensive the governing legal standard, the more similar the instant case must be to a past one for the reasonable public official to have fair warning of his legal responsibility. Sometimes the rule that emerges from decisional law may be discernible at a high enough level of abstraction that public officials can be expected to know and apply that rule in a wide variety of cases. Cf. *Lanier*, 520 U.S. at 271 ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"). This is not an exception to the material similarity standard but rather a healthy example of its flexibility in application. The ACLU (Br. 5-7) offers the example of racial discrimination, which respondents accept. If Hope had charged, for example, that certain officers told him they put him on the restraining bar because of his race, the officers

would likely not be entitled to qualified immunity, regardless of whether there was a previous case in which prison officers had been held liable for using the restraining bar in a manner that was racially discriminatory. The only material fact making the hypothetical case similar to countless past ones would have been the racial discrimination on the part of the officers. The use of the restraining bar to accomplish the discrimination would have been immaterial. A reasonable official would have seen the similarity regardless.

Respondents submit that the question whether a condition of confinement is cruel and unusual rests far to the fact-intensive side of the spectrum. It inevitably requires consideration of a wide variety of circumstances and the balance of competing individual and public interests. Nationwide, the courts of appeals almost always award qualified immunity to prison officials in conditions-of-confinement cases. See, e.g., *Thomas* v. *Ramos*, 130 F.3d 754 (7th Cir. 1998) (official who allegedly refused to allow inmate to exercise in yard while he was confined in disciplinary segregation for 70 days was entitled to qualified immunity); *Osolinski* v. *Kane*, 92 F.3d 934 (9th Cir. 1996) (prison officials who failed to repair oven that injured an inmate were entitled to qualified immunity against inmate's Eighth Amendment claim); *Prater* v. *Dahm*, 89 F.3d 538 (8th Cir. 1996) (prison officials who failed to protect inmate from an attack from a fellow inmate were entitled to qualified immunity against inmate's Eighth Amendment claim); *Seltzer-Bey* v. *Delo*, 66 F.3d 961 (8th Cir. 1995) (prison officials were entitled to qualified immunity from inmate's claim that his placement in a stripped cell for two days without clothing,

bedding, or running water, with a concrete floor, a concrete slab for a bed, and cold air blowing on him constituted cruel and unusual punishment); *Adkins* v. *Rodriguez*, 59 F.3d 1034 (10th Cir. 1995) (prison official who allegedly sexually harassed a female inmate and appeared in her cell without authorization was entitled to qualified immunity against the inmate's Eighth Amendment claim); *Williams* v. *Delo*, 49 F.3d 442 (8th Cir. 1995) (prison officials were entitled to qualified immunity against inmate's claim that the conditions of his stripped cell violated Eighth Amendment); *Rodgers* v. *Jabe*, 43 F.3d 1082 (6th Cir. 1995) (prison officials were entitled to qualified immunity against inmate's allegations he was denied adequate outdoor exercise in violation of his Eighth Amendment rights); *Lopez* v. *Robinson*, 914 F.2d 486 (4th Cir. 1990) (prison officials were entitled to qualified immunity from inmates' claims that alleged inadequate ventilation system, incident in which inmates were locked down for 12 to 24 hours without running water in their cells, alleged inadequacy of hot water for showers, alleged cold cells during the winter, and the practice of double-celling inmates violated Eighth Amendment); *Birrell* v. *Brown*, 867 F.2d 956 (6th Cir. 1989) (prison officials were entitled to qualified immunity from inmate's claims that under-staffing of institution and practice of housing inmates before desired or planned renovations at the facility could be completed violated the Eighth Amendment); *Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978) (prison officials were entitled to qualified immunity against inmate's claims that "summary punishments," a shooting by a trustee guard, and a stabbing by a fellow inmate amounted to Eighth Amendment violations); but see

Marsh v. *Butler County*, 268 F.3d 1014 (11th Cir. 2001) (sheriff who failed to address deteriorating prison conditions that for the most part had been identified as Eighth Amendment violations in prior cases was *not* entitled to qualified immunity). This Court should accordingly require a much higher degree of similarity between this case and past ones than petitioner and his amici urge is necessary to deprive respondents of their qualified immunity.

B. Use of the restraining bar in accordance with Regulation 429 was neither patently cruel and unusual nor materially similar to any form of punishment deemed cruel and unusual by a court.

The second question the Court directed the parties to address is the specific one: whether putting Hope on the restraining bar "under the circumstances that must be taken as true at the summary judgment state of this case" violated Hope's "clearly established" rights, thereby depriving Pelzer, McClaran, and Gates of qualified immunity. As argued in Part I, even viewed through the prism of a summary judgment motion, the record does not establish that Pelzer, McClaran, and Gates violated any of Hope's Eighth Amendment rights, clearly established or not.

1. This is not the extreme case in which the punishment is patently cruel and unusual. Not even the court of appeals below held that the restraining bar was unconstitutional in all uses and conceded that it could be used at least as a means of temporary restraint. App. 9.

2. The relevant case law in 1995 did not come close to establishing a clear rule that the restraining bar was unconstitutional when used in accordance with Regulation 429. As noted above, in the 1991 case of *Williams* v. *Burton*, the Eleventh Circuit had held that gagging and binding a violent prisoner in four-point restraints for twenty-eight consecutive hours did not constitute excessive force in violation of the Eighth Amendment. 943 F.2d 1572. In two cases that did not involve physical restraint but rather confinement to a cell for extended periods, the Eleventh Circuit had also rejected claims under the Eighth Amendment. *Sims* v. *Mashburn*, 25 F.3d 980 (1994) (confining prisoner to a stripped cell for twenty-nine hours, disconnecting the water to his toilet, and removing all his clothing except his undershorts did not constitute excessive force in violation of the Eighth Amendment); *Ort* v. *White*, 813 F.2d 318 (1987) (confining prisoner to sally port and denying him water for refusing to work did not constitute excessive force in violation of the Eighth Amendment). And in *Wells* v. *Franzen*, 777 F.2d 1258 (1985), the Seventh Circuit had held that shackling a prisoner by his four limbs to a bed for nine days straight, without bathroom breaks or regular access to water, did not violate the Eighth Amendment. *Id.* at 1258, 1260-61, 1264. These cases had all involved prison conditions or applications of force more severe than the restraining bar, yet the courts had found no Eighth Amendment violations.

The 1987 Eleventh Circuit decision in *Ort* v. *White* bears closer attention. The inmate in *Ort* complained that a prison officer named Holladay did not allow him to "drink any water until he began to perform his assigned

tasks like the rest of his squad." 813 F.2d at 320. The court rejected the inmate's claim that the denial of water violated the Eighth Amendment, on reasoning that is appropriate to this case:

> It is clear from these facts that Ort's several refusals to carry the water keg and his selective work stoppages were spontaneous events occurring while his farm squad was out on field duty. The late squad, of which Ort seemed a charter member, remained away from the prison for the entire day, so Officer Holladay had no one to whom he could turn over an unruly or recalcitrant inmate and no way to contain such a troublemaker or segregate him from the rest of the squad. These conditions distinguish the present situation from being merely the everyday case of an inmate violating a rule or regulation while within the prison walls. This scenario dictated that the lone prison officer present on the scene take some immediate action to maintain order and discipline among the prisoners in the field. Holladay's actions therefore should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule, *i.e.* the requirement that all inmates perform their assigned farm squad duties.

813 F.2d at 325. Furthermore, said the court: "All Ort needed to do before he would be allowed to drink the water was to perform the work required of all the inmates on his farm squad." *Id.* at 326. He "essentially had the keys to the water keg in his own pocket." *Id.* "Whenever he agreed to abide by the prison rules, he would be given water just like everyone else." *Id.* The same was true for Hope in this case.

In the six pre-1995 Section 1983 cases that counsel have been able to locate in which an inmate sued an Alabama prison officer for handcuffing him to a stationary object, the district courts held that the restraint did not violate the Eighth Amendment. Two of these cases involved use of the restraining bar. *Dale* v. *Murphy*, No. CV-85-1091-H-S (S.D. Ala. 1986) (light pole); *Williamson* v. *Anderson*, No. CV-92-H-675-N (M.D. Ala. 1993) (fence); *Hollis* v. *Folsom*, No. CV-94-T-0052-N (M.D. Ala. 1994) (fence); *Vinson* v. *Thompson*, No. CV-94-A-268-N (M.D. Ala. 1994) (restraining bar); *Ashby* v. *Dees*, No. CV-94-U-0605-NE (N.D. Ala. 1994) (fence); *Lane* v. *Findley*, No. CV-93-C-1741-S (N.D. Ala. 1994) (restraining bar). In a 1994 case also involving use of the restraining bar, the district court dismissed the complaint on qualified immunity grounds. *Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala.).

Against all of this authority, petitioner and his amici contend that the lone 1974 decision in *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir.), should have made clear to Pelzer, McClaran, and Gates that the restraining bar was unconstitutional. To arrive at such a conclusion requires a dramatic over-reading of the case. *Gates* was a lawsuit against the Superintendent of the Mississippi State Penitentiary for a large number of alleged prison abuses. The record, according to the Fifth Circuit, was "replete with innumerable instances of physical brutality and abuse in disciplining inmates," including

> administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and to cells for long periods of time,

> shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods.

Id. at 1306. The Fifth Circuit found these and many other abusive practices to violate the Eighth Amendment. Petitioner and his amici, including the United States, would select the phrase "handcuffing inmates to the fence and to cells for long periods of time" from this thirty-page opinion and say that it should outweigh the other authority above and be deemed to have provided Pelzer, McClaran, and Gates with fair warning that they could not put Hope on the restraining bar.

The Fifth Circuit opinion in *Gates* says that the Mississippi prison officers should not have been handcuffing inmates "to the fence and to cells for long periods of time" as a form of corporal punishment, but it says nothing about the justifications they used, the procedures they followed, the lengths of time they put the prisoners on the fence, or the positions in which the prisoners were made to stand. Here, by contrast, McClaran, Pelzer, and Gates put Hope on the bar pursuant to a written prison policy that prescribed humane conditions for when and how the bar could be used. Hope had food, water, bathroom breaks, and medical attention, and he held the keys to his release in his own pocket, in that he could get off the bar any time he agreed to return to work. Hope has not alleged or presented evidence that McClaran, Pelzer, or Gates failed to follow this policy in any respect.

In *Wilson* v. *Layne*, which affirmed a ruling of qualified immunity for United States marshals who brought

reporters with them into homes during the execution of arrest warrants, this Court found it "important to our conclusion" that marshals relied upon a "Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests." 526 U.S. 603, 617 (1999). "Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law." *Id.* The state of law, this Court held, "was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies." *Id.* Here, an Alabama DOC policy explicitly authorized Pelzer, McClaran, and Gates to put Hope on the restraining bar because he disrupted the work crews. To the extent the law was developed, it affirmed the constitutionality of this policy. It was not unreasonable for respondents to rely upon that policy in taking the actions that they took.

III. This Court Should Reject the United States' Suggestion That It Remand For Petitioner to Engage in Discovery.

Amicus United States seems to recognize that the "limited record" (Br. 26) does not establish that Pelzer, McClaran or Gates violated any of Hope's clearly established rights. They suggest at the end of their brief that petitioner should be allowed more time for discovery to develop his case. Thereafter, "if such future discovery failed to uncover facts that establish a genuine issue as to whether respondents violated clearly established law, respondents would be entitled to immunity and summary judgment." Br. 26.

One of the chief purposes of qualified immunity is "to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.' " *Anderson*, 483 U.S. at 646 n. 6 (quoting *Harlow*, 457 U.S. at 817). Indeed, "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814. These costs include "the expenses of litigation" and "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" as public officials. *Id.* (quotation omitted). Accordingly, "qualified immunity questions should be resolved at the earliest possible stage." *Anderson*, 483 U.S. at 646 n. 6.

Petitioner's counsel had two and a half years, from the time he appeared on petitioner's behalf to the time of summary judgment, to discover facts and make more specific allegations against the respondents. If this Court were to remand due to a "limited record" that is petitioner's own responsibility, it would vitiate the protections that are supposed to be afforded by qualified immunity. The district court awarded summary judgment at the appropriate stage in the litigation. The suggestion of the United States should be rejected.

CONCLUSION

Under any standard of qualified immunity, the combined authority of Eighth Amendment jurisprudence and Regulation 429 did not "clearly establish" to Pelzer, McClaran, and Gates that putting Hope on the restraining bar was unconstitutional. Indeed, respondents submit that the authority indicates the opposite: use of the bar in accordance with Regulation 429 was and is constitutional. For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

I. THE RESPONDENTS' ARGUMENTS ARE PREMISED ON UNSUPPORTED FACTUAL CLAIMS THAT WERE NOT PROPERLY RAISED BELOW

All of the respondents' arguments in this case rest on factual assertions that have no basis in the record. When the respondents raised the same supposed "facts" for the first time on appeal, the Eleventh Circuit – guided by the requirement that the facts must be taken as true "in the light most favorable to the party asserting the injury," *Saucier v. Katz*, 533 U.S. 194, 201 (2001) – rejected them. This Court should do likewise. A party may not defend a judgment on the basis of an argument that was not properly raised below and that has no evidentiary foundation. *See Hudson v. McMillian*, 503 U.S. 1, 12 (1992) (refusing to consider respondents' argument because it was based on a factual assertion that was "inapposite on th[e] record" and because it was "not addressed" by the court below and was "not presented by the question on which [the Court] granted certiorari"); *cf. El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (affirming that party "may 'urge in support of a decree any matter appearing in the record' ") (citation omitted); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) (noting party may "defend a judgment on any ground properly raised below").

Respondents admit that the "whole point" of placing Hope on the hitching post was to induce pain – to make Hope "uncomfortable," to borrow respondents' term. Resp. Br. 27. But respondents claim that they were merely trying to persuade Hope to return to work and that Hope could have ended his ordeal at any time simply by complying. Hope, respondents claim, always "held the keys to his release in his own pocket." *Id.* at 43; *accord id.* at 2, 27-28. The district court, respondents argue, "did not find that any prison officer, much less one of the respondents,

had forced Hope to stay on the bar after he had expressed a willingness to go to work." *Id.* at 10. Although the respondents acknowledge for summary judgment purposes that they "either ordered Hope [to] be put on the bar or . . . cuffed him to the bar themselves," *id.*, they contend that they had "no reason to assume" that other officers would fail to release Hope "as soon as he agreed to return peaceably to work" pursuant to Regulation 429 of the Alabama Department of Corrections. *Id.* at 21. These supposed "facts" are necessary to respondents' claim that they did not violate petitioner's Eighth Amendment rights, *see, e.g.*, Resp. Br. 19-31, as well as to their contention that they are entitled to qualified immunity even if they did. *See, e.g., id.* at 31-44. They are equally central to the arguments of respondents' amici.

But these "facts" find no support in the record. In the proceedings before the district court, Hope alleged that the hitching post had been used against him "as a form of punishment." Supp. Pet. App. 21. The respondents never contended in their affidavits or in their briefs in response that they cuffed Hope to the post to induce him to go back to work or that he would have been released had he complied. They never contended that they told Hope or that he knew that he supposedly would be released if he agreed to go back to work. They never even contended that they had "assumed" that Hope would be released if he agreed to go back to work. Indeed, the respondents did not even introduce Regulation 429 into the district court record.[1]

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[1] The respondents suggest that the magistrate judge somehow relied upon Regulation 429 despite the fact that it was not before him and despite the fact that the respondents never claimed that they had complied with the regulation. *See* Resp. Br. 10-11 (claiming that magistrate judge found "no clearly established constitutional precedent prohibiting prison officers from employing a measure like Regulation 429"). But there is no mention of the regulation or the respondents' supposed compliance with it in the magistrate judge's recommendation or in the district court's opinion. *See* Supp. Pet. App. 1-33.

The respondents raised their claim that Hope held the "keys" to his own release for the first time on appeal. *See* Pet. App. 9 (respondents "claim[ ] that Hope would have been released from the hitching post had he asked to return to work"); Resp. C.A. Br. 5 ("unique thing about the restraining bar was [that] an inmate who wanted to return to work would be removed from the restraining bar and returned to work"); *id.* at 17. Following oral argument, they lodged a copy of Regulation 429 with the court of appeals. *See* App. 108-112.

The court of appeals rejected the respondents' new factual claim. Instead of crediting respondents' assertions that they cuffed Hope to the post to induce him to work and that he held the keys to his own release, the court recognized that the record, viewed most favorably to Hope, compelled the opposite conclusion.

> While the DOC claims that Hope would have been released from the hitching post had he asked to return to work, the evidence suggests that is not the case. First, Hope never refused to work. . . . Second, Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post on both occasions. Given the facts, it is improbable that had Hope said, "I want to go back to work," a prison guard would have left his post at Limestone to drive Hope back to the work site. It is more likely that the guards left Hope on the post until after his work detail returned to teach the other inmates a lesson.

Pet. App. 9-10; *see* App. 47 (Hope Aff.) ("I was *left* on the hitching post for approximately seven (7) hours")

(emphasis added).[2] Because the "written policy, Alabama Administrative Regulation 429, [was] not in the district court record," the court of appeals did "not address it." Pet. App. 4 n.5.

Respondents contend that the court of appeals had "no record basis" to reject their claim that Hope held the keys to his own release. Resp. Br. 13. They repeatedly argue that Hope never claimed that he was left on the post after he expressed a willingness to return to work. But respondents ignore the fact that this issue was part of their defense, not one for Hope to rebut in advance. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified or 'good faith' immunity is an affirmative defense. . . . ") (citation omitted). And they ignore the fact that they never claimed in the district court that Hope would have been released had he agreed to return to work or even that they had "assumed" that he would have been. The district court never made particularized findings on these issues because the respondents never asked the court to do so. Saddling Hope with the absence of "findings" rebutting a defense that was never raised – the respondents' suggestion here, *see* Resp. Br. 11-13 – would be a far cry from viewing the facts "in the light most favorable to the party asserting the injury." *Saucier*, 533 U.S. at 201.

The court of appeals' refusal to credit the respondents' claim that Hope held the keys to his own release is consistent with the findings in *Austin v. Hopper*, 15

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[2] Respondents argue that "it must be assumed" that Hope was allowed at least a bathroom break during his seven hours on the post in June 1995 because he was given such a break while on the post in May. Resp. Br. 13-14. But in the face of Hope's statement that he was "left" on the post for seven hours, App. 47, this inference would be an impermissible one in the absence of specific evidence to support it. The prison logs that respondents claim Hope should have introduced to prove his point, *see* Resp. Br. 13, were within the respondents' control.

F. Supp. 2d 1210 (M.D. Ala. 1998). There, the court found that inmates "were forced to stay on the hitching post until their squad had returned from the work site" even if they expressed a willingness to work, *id.* at 1245 – exactly the same conclusion that the Department of Justice reached in an investigation conducted the year before the events giving rise to this case. *See id.* at 1249 (citing DOJ findings that hitching post was used as a form of "corporal punishment" and that corrections officers "failed to comply with the policy of immediately releasing any inmate from the hitching post who agrees to return to work"). Although the respondents may not be bound by the *Austin* or Department of Justice findings, those findings are all the more reason why this Court should not credit the respondents' unsupported claim that they "assumed" when they put Hope on the post that he would be released pursuant to Regulation 429 if he agreed to return to work.

The respondents concede that the record supports the conclusion that they "either ordered Hope [to] be put on the bar or had cuffed him to the bar themselves." Resp. Br. 10. But they claim that their responsibility ended there. *See id.* at 10, 14; *accord* Mo. Amici Br. 18, 22-23. The suggestion, of course, is that Hope sued the wrong people. But this line of argument – with its hypothetical division of labor between guards who place inmates on the hitching post and guards who are supposedly responsible for releasing inmates once they agree to return to work – rests entirely on the respondents' contention that they handcuffed Hope to the post to induce him to return to work, rather than to punish him after he had fought with another inmate and five guards. Because this contention was not raised in the district court and because the record, viewed most favorable to Hope, compels the opposite conclusion, this Court should not consider it.

II. THE COURT OF APPEALS' RULING ON THE UNDERLYING CONSTITUTIONAL RIGHTS ISSUE IS NOT BEFORE THE COURT, BUT IS CORRECT

A. The first issue briefed by respondents – the question whether the court of appeals correctly ruled that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment," Pet. App. 11 – is not before the Court. In *Saucier v. Katz*, the Court explained that qualified immunity cases raise two distinct questions. 533 U.S. at 201. The first question is whether the facts alleged make out a violation of a constitutional right; the second question is whether that right was "clearly established." *Id.* In this case as in *Saucier*, the Court limited its grant of certiorari to issues concerning the second question. *Compare Hope v. Pelzer*, 122 S. Ct. 933 (2002) (No. 01-309), *with Saucier*, 533 U.S. at 207. Accordingly, the Court should not consider the first issue that respondents address, the constitutional rights question. *See* Sup. Ct. R. 14.1(a).

Because the court of appeals ruled that Hope's constitutional rights had been violated, Hope limited his petition for certiorari to issues concerning the second *Saucier* question. *See* Pet. Cert. i. Respondents' opposition to the petition did not take issue with the formulation of the questions or suggest that the Court had to or should consider the constitutional rights issue if it granted the petition. After granting the petition, the Court entered an order further limiting the questions presented. 122 S. Ct. 933 (No. 01-309).

Respondents admit that the two questions framed by the Court relate solely to the second *Saucier* question, the "clearly established" inquiry. Resp. Br. 19. They argue that the Court should nevertheless address the constitutional

rights issue because *Saucier* "made clear that, in Section 1983 cases, the question of constitutionality must be addressed" first. *Id.* But the fact that the lower courts, in resolving qualified immunity cases, should address the constitutional rights issue before proceeding to the second part of the *Saucier* inquiry does not mean that this Court, after the lower courts have resolved the threshold constitutional issue, cannot exercise its discretionary jurisdiction by limiting its grant of certiorari to issues concerning the second *Saucier* question. Indeed, in *Saucier*, the Court did just that. *See* 533 U.S. at 207 ("Because we granted certiorari only to determine whether qualified immunity was appropriate, . . . and because of the limits imposed upon us by the questions on which we granted review, we will assume a constitutional violation. . . . ").

This case is not the "exceptional" one where the Court should reach out to decide a question beyond those presented. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Indeed, this case is a particularly inappropriate one for the Court to bend its certiorari procedure. Respondents' discussion of the constitutional rights issue is predicated upon their factual claims that "Hope held the keys to his release" (or at least that they "assumed" that he did), Resp. Br. 20, 27; *see id.* at 19-31 – claims that have no basis in the record. *See* § I, *supra*.[3] Respondents' argument also is predicated upon their claim that the use

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[3] The respondents' efforts to rewrite the record are quite extensive. *Compare, e.g.*, Resp. Br. 25 (Hope "was able to stand fully erect and lean his shoulders against the bar to take some pressure off the muscles in his arms and chest"), *with* Supp. Pet. App. 14 (magistrate judge recommendation) ("plaintiff is only slightly taller than the hitching post itself so his arms grew tired from being handcuffed so high"), *and* App. 45 (Hope Aff.) ("whenever I tried moving [my arms] to improve my circulation, the handcuffs would cut into my wrists and cause great pain and discomfort").

of the hitching post "was a cost-effective, safe and relatively pain-free way to impel inmates to work." Resp. Br. 31; *see id.* at 28. But there is no evidence in the record to support these factual claims either, and they are contradicted not only by the evidence that is in the record about what happened to Hope but also by numerous findings in the *Austin* case. *See, e.g., Austin*, 15 F. Supp. 2d at 1243-50 (detailing hitching post safety procedures not followed); *id.* at 1243 (concluding that hitching post inflicted "substantial physical harm to inmates"); *id.* at 1256 (adopting magistrate judge's conclusion that hitching post inflicted " 'extreme pain' "); *id.* at 1252 (finding typical use of hitching post not justified by "security risk, disturbance, or other type of situation requiring an immediately necessarily coercive measure"). This Court should not accept the respondents' invitation to go beyond the questions presented and decide an issue based upon the hypothetical set of facts that they have presented.

B. Even if the Court decides to address the first *Saucier* issue – the question whether Hope has alleged a violation of a constitutional right – it should come to the same conclusion as the court below: "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment." Pet. App. 9; *see Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (handcuffing inmates to fences and forcing them to stand in awkward positions for prolonged periods violates the Eighth Amendment).

"[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). "Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' " *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citation omitted). Courts considering Eighth

Amendment claims must, therefore, ask two questions. First, did prison officials act with a sufficiently culpable state of mind? *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Second, was the deprivation suffered by the prisoner sufficiently serious? *Id.*

In cases where inmates allege that prison conditions cause unnecessary suffering, the appropriate subjective inquiry is whether officials acted with "deliberate indifference" to inmate health or safety. *Hudson v. McMillian*, 503 U.S. 4, 5 (1991). On the other hand, where inmates allege that excessive force has been used, the inquiry is " 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Whitley*, 475 U.S. at 320-21 (citation omitted). The court of appeals applied the "deliberate indifference" test, rather than the *Whitley* standard, because the respondents "no longer faced the type of exigent circumstances required to invoke the *Whitley* standard" when they placed Hope on the hitching post. Pet. App. 5 n.7. But under either, the result is the same.

As the court of appeals held, Hope satisfied the "deliberate indifference" standard by "showing that the [respondents] were aware that placing him on the hitching post created a substantial risk of harm." Pet. App. 6. Even assuming that the respondents cannot be charged with notice of the Department of Justice report warning prison officials of the dangers posed by the hitching post, *see* Resp. Br. 22, the risk of harm caused by leaving anyone cuffed to a post "with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks," was obvious. Pet. App. 6; *see Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"). The

respondents admit, moreover, that the "whole point" of the hitching post was to cause pain. Resp. Br. 27. Given that there was no penological justification for inflicting pain in this case – there is no evidence in the record, for example, that exigent circumstances required Hope to be restrained or that the post was used to induce him to return to work – the *Whitley* standard has been satisfied. *See Whitley*, 475 U.S. at 320; *see also Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) ("Prison officials step over the line of constitutionally permissible conduct . . . if they summarily and maliciously inflict harm in retaliation for past conduct."); § V, *infra*.

Once the subjective component of an Eighth Amendment claim has been established, courts must determine "if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation." *Hudson*, 503 U.S. at 8 (citation omitted). In conditions-of-confinement cases, "because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the 'minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* at 9 (citation omitted). Where, on the other hand, excessive force is alleged, the plaintiff need not demonstrate a "significant injury." *Id.*

Hope has met the objective component of the Eighth Amendment under either standard. He was "denied basic human necessities, such as water" and bathroom breaks, he was forced to stand for seven hours under a hot sun in an awkward position, his freedom of movement was severely restricted, and he suffered sunburn, swollen and bruised wrists, and extreme thirst. Pet. App. 8-9; App. 10-11; *cf. Washington v. Harper*, 494 U.S. 210, 226-27 (1990) (emphasis added) ("[p]hysical restraints are effective only in the short term, and *can have serious physical side effects when used on a resisting inmate*"). He also alleged that he

suffered psychological pain that required medical attention. *See* App. 8; *cf. Hudson*, 503 U.S. at 16 (1992) (Blackmun, J., concurring) (noting that the "pain" prohibited by the Eighth Amendment includes psychological pain).

This Court should not underestimate the danger of sanctioning any form of corporal punishment. *See generally Austin*, 15 F. Supp. 2d at 1246-48, 1256-58 (detailing hitching post abuses). As the court in *Gates* recognized, the kinds of abuses at issue here "offend contemporary standards of decency, human dignity, and precepts of civilization which we profess to possess." 501 F.2d at 1306.

III. THERE NEED NOT BE A PRIOR CASE WITH "MATERIALLY SIMILAR" FACTS TO OVERCOME THE DEFENSE OF QUALIFIED IMMUNITY

The first question posed by the Court is whether a plaintiff must point to a case presenting "materially similar" facts to demonstrate that the law is "clearly established" in order to overcome the defense of qualified immunity. In their brief, the respondents concede that a plaintiff need not always do so. Resp. Br. 32 (not required in "extreme cases"). The fact that the "material similarity" standard is inappropriate in certain cases reflects, not that the standard is "flexible" as the respondents suggest, *id.* at 36, but rather that it poses a danger of upsetting the balance of "conflicting concerns" in qualified immunity cases. *Anderson v. Creighton*, 483 U.S 635, 638 (1987); *see also Harlow*, 457 U.S. at 813 ("The resolution of immunity questions inherently requires a balance. . . . "). To overcome a qualified immunity defense, a plaintiff must show that the government official in question had "fair warning" of what the law required, not that there had been an earlier case with "materially similar"

facts. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

Respondents and their amici attempt to avoid the consequences of the concession that "material similarity" is not always required by limiting the concession to cases involving statutory or constitutional text. "Unless a constitutional provision or statute on its face establishes the unlawfulness of the conduct at issue," respondents' amici contend, "public officials can be deprived of their qualified immunity only if the unlawfulness of that conduct is 'clearly established' by a controlling, materially similar case." Mo. Amici Br. 6 (upper casing and bolding removed). The respondents appear to make a similar claim. Resp. Br. 32 ("[e]xcept for extreme cases, in which the right violated is readily apparent without aid of judicial precedent," case with materially similar facts required); *id.* at 36 ("In most Section 1983 cases, however, the right claimed does not spring obviously from the constitutional or statutory text. . . . ").

But the Court's decision in *Lanier* undercuts this view. In *Lanier*, the Court made it clear that a constitutional rule "identified in the decisional law" – not simply the text of the Constitution itself – "may apply with obvious clarity" to a new case. 520 U.S. at 271. Just as some punishments may be so harsh that they obviously run afoul of the prohibition against "cruel and unusual" punishment contained in the text of the Eighth Amendment, for example, so too may some punishments be so harsh that they obviously run afoul of the prohibition against "the unnecessary and wanton infliction of pain" contained in the decisional law interpreting the Eighth Amendment. *See Wilson v. Seiter*, 501 U.S. at 297.

The suggestion by respondents' amici that the Court look to its habeas jurisprudence to answer the first question presented is grounded on a serious misreading of *Williams v. Taylor*, 529 U.S. 362 (2000). According to

respondents' amici, Justice Stevens' opinion in *Williams* "noted that the *Teague* rule [from the habeas context] was the 'conceptual twin' of the 'clearly established law' inquiry in the qualified immunity context." Mo. Amici Br. 12 (citing *Williams*, 529 U.S. at 380 n.12 (Stevens, J., concurring)). Actually, Justice Stevens' opinion *rejected* the analogy between the phrase "clearly established" law in the habeas context, 28 U.S.C. § 2254(d)(1), and the similar phrase in "the doctrinally distinct law of qualified immunity" – an "unrelated area of [the Court's] jurisprudence." 529 U.S. at 380 n.12. The "clearly established" law requirement in the habeas context is "the conceptual twin" not of the similar phrase in the qualified immunity context, but of the "new rule" habeas jurisprudence originating with *Teague v. Lane*, 489 U.S. 288 (1989). *See Williams*, 529 U.S. at 379-80 n.12 (Stevens, J., concurring).

Habeas jurisprudence and the law of qualified immunity are animated by different concerns. In the habeas context, where there has been a state court adjudication on the merits of a constitutional claim, the federal courts must be sensitive to "principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). In the qualified immunity context, the federal courts must balance the need to vindicate "constitutional guarantees" against the need to minimize the "social costs" of litigation against blameless public officials. *Harlow*, 457 U.S. at 813-14. In qualified immunity cases, there is no issue of deferring to final state court judgments, nor are state officials entitled to any heightened degree of immunity in the name of federalism or comity. *See id.* at 818 n.30 ("[I]t would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' " (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978))). As a practical matter, there is little to be gained by forcing an analogy between

habeas and qualified immunity cases merely because the cases happen to employ similar terms.[4] The fact that habeas law is statutorily based is another reason the Court should not tie its qualified immunity jurisprudence to it.

IV. THE UNCONSTITUTIONALITY OF USING RESTRAINTS AS PUNISHMENT WAS CLEARLY ESTABLISHED IN 1995

When Hope was handcuffed to the hitching post in an awkward position in the hot sun for seven hours in 1995, it was clearly established that such a form of punishment was unconstitutional. *See, e.g., Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). The fact that a number of magistrate judges missed *Gates* in prior cases is irrelevant. *See Elder v. Holloway*, 510 U.S. 510, 515 (1994) (holding that qualified immunity rulings cannot turn on "shortages in counsel's or the court's legal research or briefing"). The respondents' argument that *Gates* does not apply here is predicated upon their familiar claim that Hope "held the keys to his own release" – a claim that has no basis in the record. In this case, there were no exigent circumstances or other valid penological reasons for using the hitching post. For this reason, all the cases relied upon by respondents actually support Hope's position.

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[4] Respondents' amici argue that adopting the Eleventh Circuit's material similarity standard for qualified immunity cases "would allow courts to look to the habeas context for guidance in determining whether a particular right or principle is 'clearly established' in the case law." Mo. Amici Br. 16. But courts resolving qualified immunity questions are not now constrained from looking beyond qualified immunity cases to determine whether a right is "clearly established."

In *Gates*, the former Fifth Circuit found that "handcuffing inmates to the fence and to cells for long periods of time . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" violated the Eighth Amendment. *Id.* at 1306. The respondents concede that the practices outlawed in *Gates* were "abusive" and constituted "corporal punishment." Resp. Br. 43. Predictably, they attempt to distinguish their own identical practices by claiming that they "put Hope on the bar pursuant to a written prison policy" that gave Hope "the keys to his release." *Id.* Because there is no underlying support for their factual contention, the distinction carries no weight.

Given the absence of any evidence that the respondents put Hope on the hitching post to induce him to go to work pursuant to their Regulation 429, *Wilson v. Layne*, 526 U.S. 603 (1999), is entirely beside the point. In *Wilson*, the Court affirmed a ruling of qualified immunity for United States marshals who had allowed reporters to accompany them during the execution of arrest warrants pursuant to a policy that explicitly permitted the challenged practice. *Id.* at 617. But unlike in *Wilson*, the only permissible inference in this case is that the respondents acted contrary to the supposed policy, not pursuant to it. Even if there had been a written policy that allowed correctional officers to use a hitching post to punish inmates, it could not insulate those who followed it from the force of *Gates*. *See Wilson*, 526 U.S. at 617 (a policy cannot " make reasonable a belief that was contrary to a decided body of case law"); *cf. Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986) (holding that a police officer who unreasonably applies to a magistrate for a search warrant "cannot excuse his own default by pointing to the greater incompetence of the magistrate [who approved the officer's request]").

In an effort to blunt *Gates'* clear application to their conduct, the respondents cite seven unpublished magistrate judge recommendations they claim authorized their actions. *See* Resp. Br. 42, 44. Six were dismissals of *pro se* challenges to various practices involving the handcuffing of inmates to stationary objects.[5] In the one case in which an attorney appeared on behalf of the inmate, the magistrate judge relied heavily on the fact that the defendant officer "gave [the inmate] the choice of either working or being handcuffed to the security bar," a fact that is conspicuously absent here. *Whitson v. Gillikin*, No. CV-93-H-1517-NE, slip op. at 10 (N.D. Ala. Jan. 24, 1994). None of the magistrate judge recommendations considered or even cited *Gates*, a case directly on point. As the Court recognized in *Elder v. Holloway*, qualified immunity dispositions must be conducted in light of *all* relevant precedents, not simply those cited, or discovered by the district court. 510 U.S. at 515-16. The fact that the various magistrate judges missed a controlling case does not

[5] Two of the cases involved use of a hitching post. *Vinson v. Thompson*, No. CV-94-A-268-N, slip op. at 2, 5 (M.D. Ala. Dec. 9, 1994) (dismissing challenge of 45-minute restraint on hitching post for failure to present any evidence in support of allegations); *Lane v. Findley*, No. CV-93-C-1741-S, slip op. at 9 (N.D. Ala. Aug. 4, 1994) ("It is important to note that [the inmate] was given food, water, and the opportunity to use toilet facilities. . . . "). Three of the cases involved handcuffing inmates to fences. *Hollis v. Folsom*, No. CV-94-T-0052-N, slip op. at 9 (M.D. Ala. Nov. 4, 1994) (handcuffed to fence for 15 minutes); *Ashby v. Dees*, No. CV-94-U-0605-NE (N.D. Ala. Dec. 27, 1994) (handcuffed to fence for 45 minutes); *Williamson v. Anderson*, No. CV-92-H-675-N, slip op. at 3 (M.D. Ala. Aug. 18, 1993) (summarily dismissing Eighth Amendment claim). One case involved handcuffing an inmate around a light pole. *Dale v. Murphy*, No. CV-85-1091-H-S, slip op. at 2 (S.D. Ala. Feb. 4, 1986) (handcuffed to pole in squash field for 35 minutes).

mean that *Gates* should be read out of the Federal Reporter. As the Court noted in *Elder*, qualified immunity rulings cannot turn on "shortages in counsel's or the court's legal research or briefing." *Id.* at 515.

The respondents also rely on a series of cases permitting restraints and other coercive practices to be used as temporary measures in emergency situations. *See* Resp. Br. 40-41. These cases actually support Hope's position, not the respondents', given that there is nothing in the record showing that an emergency existed that would have justified the restraints imposed on Hope.[6] In *Ort v. White*, 813 F.2d 318 (11th Cir. 1987), the case most heavily relied upon by the respondents and their amici, the Eleventh Circuit upheld the denial of water to an inmate who was creating a disturbance at a workplace outside of the prison. The court emphasized that the officer "faced a disruptive and potentially dangerous situation, compounded by the fact that he was out in the field away from the additional manpower and security of the prison facility." *Id.* at 325. The court explained that it may have

[6] *Wells v. Franzen*, 777 F.2d 1258 (7th Cir. 1985), a Seventh Circuit decision that involved the restraint of a suicidal inmate to his bed for nine days, would also support Hope's position, not the respondents', if it were applicable in the Eleventh Circuit. *Cf. Hansen v. Soldenwagner*, 19 F.3d 573, 578 n.6 (11th Cir. 1994) ("[T]he case law of one other circuit cannot settle the law in [the Eleventh] circuit to the point of being 'clearly established.' "). The court of appeals did not hold, as the respondents claim, that "shackling a prisoner by his four limbs to a bed for nine days straight, without bathroom breaks or regular access to water, did not violate the Eighth Amendment." Resp. Br. 40. To the contrary, the Seventh Circuit reversed the district court's grant of summary judgment for the defendants, holding that "[i]n light of the eighth amendment precedents, plaintiff's allegations concerning the conditions of his restraint are sufficient to warrant further examination." *Wells*, 777 F.2d at 1264.

reached a different result if the denial of water to the inmate – like the use of the hitching post here – had been used as punishment upon return to the prison. *Id.* at 326 ("We acknowledge that we might have reached a different decision if later, ***once back at the prison***, officials had decided to deny appellant water as punishment for his refusal to work.") (emphasis added).

The respondents here never alleged that exigent circumstances justified their acts, nor did they ever allege in the district court that they put Hope on the post to induce him to return to work. Under the standard clearly established by *Ort*, the record here shows that Hope was subjected to the hitching post as *punishment* "administered to chastise the wrongdoer and to deter him and others from engaging in such unacceptable conduct in the future. Punishment in this sense is not designed to bring an ongoing violation to a halt." *Id.* at 322. The court of appeals recognized this point. *See* Pet. App. 9-10.[7]

Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991), another case relied upon by the respondents and their amici, also establishes that the unnecessary use of

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[7] Even if the hitching post had been employed to induce Hope to return to work, its use would still be subject to constitutional scrutiny. Applying a cattle prod to an inmate's body would surely be effective at coercing a recalcitrant inmate to return to work. The relevant question under the Eighth Amendment, of course, is whether the use of a cattle prod would inflict unnecessary pain, not whether it would be effective at coercing an inmate to return to work (which it surely would). If, as the respondents imply, the Eighth Amendment permitted all coercive measures, no matter how painful, the use of a cattle prod to induce an inmate to return to work would not violate the constitution. *Cf. Hickey v. Reeder*, 12 F.3d 754, 758-59 (8th Cir. 1993) (holding prison officials' use of stun gun to compel inmate's compliance with an order to clean his cell constituted the infliction of unnecessary pain in violation of the Eighth Amendment).

restraints violates the Eighth Amendment. *Williams* upheld the use of four-point restraints for twenty-eight hours against an inmate who had "cursed and threatened to kill" two officers and had spat and threw bodily fluids on them. *Id.* at 1574. Unlike here, prison officials "were faced with a volatile situation" because Williams "was trying to incite other inmates to join him in a prison disturbance. . . . " *Id.* at 1575. The *Williams* court specifically distinguished cases like Hope's in which restraints are used as punishment, rather than as emergency measures:

> [Even if] restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that ***once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation.***

943 F.2d at 1575-76 (emphasis added); *accord Sims v. Mashburn*, 25 F.3d 980 (11th Cir. 1994) (holding officers were justified by exigent circumstances in stripping inmate's segregation cell and disconnecting his water).

Unlike the circumstances in *Ort* and *Williams*, there is no record basis upon which to conclude here that the respondents faced exigent circumstances that required them to use restraints. Although Hope fought with several officers on the work bus, he was not hitched to the post until after he was returned to the prison, more than an hour later. As the court of appeals pointed out, "[b]ecause the officers drove Hope back to Limestone before placing him on the hitching post, they no longer faced . . . exigent circumstances." Pet. App. 5 n.7; *cf. Ort*,

813 F.2d at 326 ("We acknowledge that we might have reached a different decision if later, ***once back at the prison***, officials had decided to deny appellant water as punishment for his refusal to work.") (emphasis added). The respondents do not dispute the point.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 01-309

In the Supreme Court of the United States

LARRY HOPE, PETITIONER

v.

MARK PELZER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether state officials sued in their individual capacities under 42 U.S.C. 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts "materially similar" to those in plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. 1983.

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INTEREST OF THE UNITED STATES

This case concerns the law of qualified immunity and particularly the standards for determining whether, for purposes of qualified immunity, Eighth Amendment claims in the prison context rest on "clearly established" law. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 (1994 & Supp. V 1999) also apply in civil actions against federal personnel under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). The United States has an interest in protecting government employees, including per-

sonnel of the Federal Bureau of Prisons, from meritless and unduly burdensome litigation that may interfere with the exercise of lawful discretion in their official functions and deter qualified individuals from public service. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees and in ensuring that adequate remedies exist for violations of constitutional rights.

The United States has a further interest in this case because the standard for determining whether the law is "clearly established" when an official asserts qualified immunity in civil litigation is equivalent to the standard for deciding whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that he or she was violating a constitutional right. See *United States* v. *Lanier*, 520 U.S. 259, 270-272 (1997). The Court's decision in this case therefore may affect federal enforcement of 18 U.S.C. 241 and 242.

Finally, the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, authorizes the United States Department of Justice to investigate conditions of confinement in correctional facilities when it is alleged that prisoners are being deprived of constitutional rights pursuant to a pattern or practice of resistance to the full enjoyment of those rights. When he has reasonable cause to believe that such deprivations exist, the Attorney General may initiate a civil action in the name of the United States against state or local officials to remedy unconstitutional conditions of confinement. See 42 U.S.C. 1997a(a). Pursuant to CRIPA, the Department of Justice has investigated Alabama's practice of shackling inmates to a restraining bar—like the one involved in this case—at a prison other than the institution at issue in this case. After

that investigation, the Department of Justice advised the State of Alabama that its practice was unconstitutional.

STATEMENT

1. Administrative Regulation Number 429 of the Alabama Department of Corrections provides that inmates who "refuse[] to work or [are] otherwise disruptive to [a prison] work squad" shall be handcuffed to a restraining bar known as a "hitching post." Ala. Dep't of Corrs. Reg. 429, at 1 (Oct. 26, 1993) (Reg. 429); see Pet. App. 4; Br. in Opp. 1. The federal district court in *Austin* v. *Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998), which found Alabama's shackling of inmates to hitching posts unconstitutional (*id.* at 1265-1266), described the apparatus and its use:

> Regulation 429 describes the hitching post or restraining bar as a horizontal bar, "made of sturdy, nonflexible material," placed at 57 inches and 45 inches from the ground so as to accommodate inmates of varying heights. Inmates are handcuffed to the hitching post in a standing position and remain standing the entire time they are placed on the post. Although corrections officers are instructed to handcuff the inmates to the post at "mid-chest level," the plaintiffs presented evidence that some inmates were handcuffed such that they were forced to stand with their arms above their heads, while others were handcuffed such that they could not stand upright while handcuffed to the post. Most inmates are shackled to the hitching post with their two hands relatively close together, however some inmates were handcuffed so that their arms were spread apart and their hands shackled independently. Some facilities also shackle

the inmates' ankles together when the inmates are on the post.

Inmates eat their lunches while standing and with both hands shackled to the post. * * * Inmates are not permitted breaks to flex or stretch their muscles while they are on the post. * * * [M]any inmates reported being in mild to severe pain during and after their placement on the hitching post because of the strain on their muscles.

* * * * *

Once an officer has determined that an inmate has refused to work or is disruptive to a work squad, the officer may place the inmate on the hitching post, using force if necessary. No disciplinary hearing or other type of due process procedure is provided to the inmate.

Id. at 1241-1242 (footnotes omitted).[1]

The hitching posts at Alabama's prisons are located outdoors. See Pet. 3. Regulation 429 provides that an inmate shackled to the bar should remain there until he agrees to return to work or, if the inmate does not agree to return to work, until "after the last [work] squad is checked in[to the prison]." Reg. 429, at 1-2. The regulation also requires prison officials to give the inmate medical attention either after he is put on the hitching post (if force has been used against the inmate) or after he is removed from it. *Id.* at 1; see *Austin*, 15 F. Supp. 2d at 1242. Inmates are to be offered fresh water and hourly bathroom breaks. Reg. 429, at 1; 15

[1] In its decision in this case, the Eleventh Circuit deemed the *Austin* court's Eighth Amendment analysis of Alabama's use of hitching posts "sound and directly applicable to our case." Pet. App. 4 n.6.

F. Supp. 2d at 1242. Inmates who are placed on the hitching post are subject to additional prison discipline for their refusal to work. Reg. 429, at 2; 15 F. Supp. 2d at 1242-1243.

Alabama's prisons are the only prisons in the United States that use the hitching post or a similar device. See *Austin*, 15 F. Supp. 2d at 1250. A regulation of the Federal Bureau of Prisons provides that "[r]estraint equipment or devices (*e.g.*, handcuffs) may not be used * * * [a]s a method of punishing an inmate"; "in any manner which restricts blood circulation"; "[i]n a manner that causes unnecessary physical pain or extreme discomfort"; or "[t]o secure an inmate to a fixed object, such as a cell door or cell grill, except as provided in [28 C.F.R.] 552.24 [addressing use of restraints where necessary to control inmate]." 28 C.F.R. 552.22(h).

The United States Department of Justice investigated Alabama's Easterling Correctional Facility under CRIPA and, based upon that investigation, notified the State of Alabama in March 1995 that its use of a hitching post at that prison did not comply with the requirements of Regulation 429, created medical risks for inmates, served no valid penological purpose, and was unconstitutional. The State of Alabama responded that it had determined to continue using the hitching post at its Easterling prison and that it believed the practice was necessary to preserve prison security and discipline, as well as constitutional. See Pet. App. 6-7; *Austin*, 15 F. Supp. 2d at 1249-1250.

2. In 1995, petitioner was incarcerated at Alabama's Limestone Correctional Facility. He was assigned to the prison's chain gang. Pet. App. 2. Respondents were guards at the prison. *Id.* at 3.

On May 11, 1995, petitioner had a verbal disagreement with another inmate on the chain gang. Pet. App.

2. Guards took petitioner back to the prison and shackled him to the hitching post for disrupting the work squad. While handcuffed to the hitching post, petitioner was offered drinking water and a bathroom break every 15 minutes. Petitioner was released after approximately two hours. A prison nurse examined petitioner that evening and found no signs of injury. *Id.* at 2-3; Pet. Supp. App. 12-13.[2]

On June 7, 1995, petitioner fought with a guard while away from the prison with the chain gang. Guards forcibly subdued petitioner and then drove him back to the prison, where, after being examined by a nurse, petitioner was shackled to the hitching post. Petitioner alleges that he was handcuffed to the restraining bar in a standing position, with his arms raised, for approximately seven hours. Petitioner further alleges that he was not allowed to use a bathroom during the seven hours; that the guards gave him drinking water only once or twice and denied him water for three hours during the hottest part of the day; and that when he asked for water, guards taunted him by giving water to guard dogs and pouring water on the ground.[3] Pet. App. 3-4; Pet. Supp. App. 13-15, 26 n.10. Petitioner asserts that his arms grew tired from being handcuffed in a raised position and that his wrists became swollen and bruised. Pet. Supp. App. 14, 21. A prison nurse examined petitioner after his release from the hitching post but noted no injuries. Pet. App. 3. Petitioner

[2] Because summary judgment was entered for respondents, the record must be viewed in the light most favorable to petitioner, drawing all inferences most favorable to him. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 n.26 (1982).

[3] The guard who allegedly poured out the drinking water is not a respondent in this case. See Pet. Supp. App. 26 & n.10.

received no other discipline for the June 7 incident. Pet. Supp. App. 15.

3. Petitioner sued respondents and other guards in the United States District Court for the Northern District of Alabama under 42 U.S.C. 1983. See Pet. Supp. App. 6, 9. The district court referred the case to a magistrate judge. *Ibid.*

The magistrate judge determined that petitioner's claims were limited to Eighth Amendment claims arising from respondents' use of the hitching post on May 11 and June 7, 1995. Pet. Supp. App. 7, 15, 27. The magistrate judge further concluded that petitioner could seek only compensatory and punitive damages—not injunctive or declaratory relief—because his claims concerned completed acts and he had been released from prison. *Id.* at 7 n.1, 27.

As to the Eighth Amendment claims that were properly presented, the magistrate relied on petitioner's factual allegations and on "special reports" filed by respondents, and treated respondents' reports as motions for summary judgment. Pet. Supp. App. 7-10; see generally 42 U.S.C. 1997e(c)(1) (1994 & Supp. V 1999) (requiring courts to dismiss prisoner Section 1983 suits "on [their] own motion or on the motion of a party * * * if the court is satisfied that the action * * * seeks monetary relief from a defendant who is immune from such relief."). Looking primarily to decisions of this Court, the United States Court of Appeals for the Eleventh Circuit, and the Alabama Supreme Court, see Pet. Supp. App. 20, 21-25, 31-32, the magistrate judge found that respondents were entitled to summary judgment because their "actions in placing the plaintiff on the restraining bar were [not] so contrary to then

existing law so as to defeat their assertion of qualified immunity," *id.* at 26-27.[4]

The district court adopted the magistrate judge's report and granted summary judgment for respondents. Pet. Supp. App. 3. The district court additionally held in a short memorandum opinion (*id.* at 1-3) that, at the time of the conduct alleged in this case, it was not clearly established that respondents' use of the hitching post to restrain respondent violated either the Eighth Amendment's prohibition on cruel and unusual punishments or the Fourteenth Amendment's Due Process Clause (U.S. Const. Amend. XIV, § 1).

4. The court of appeals affirmed. Pet. App. 14. Whereas the district court failed to determine whether respondents violated petitioner's constitutional rights, the court of appeals held that handcuffing petitioner to the hitching post on May 11 and June 7, 1995, did violate his Eighth Amendment rights. The court of appeals reasoned that petitioner was shackled to the bar "for a period of time extending past that required to address an immediate danger or threat" (*id.* at 9; see *id.* at 10) and respondents "were aware that placing him on the hitching post created a substantial risk of harm" to petitioner, which respondents did nothing to abate (*id.* at 6). The court declared a "bright-line rule for any future case" (*id.* at 11): "The practice of leaving an inmate cuffed to a hitching pest when he no longer presents a threat to himself or those around him is a violation of that prisoner's Eighth Amendment right to be protected from cruel and unusual punishment,

[4] The magistrate judge also found that if petitioner had properly raised a Fourteenth Amendment due process claim, summary judgment for respondents would have been warranted on that claim as well. Pet. Supp. App. 27-31.

particularly when he is denied water and bathroom breaks" (*id.* at 13).[5]

The court of appeals concluded, however, that respondents were entitled to summary judgment in their favor on qualified immunity grounds because in 1995, when the actions took place, there was no "preexisting, obvious, and mandatory" federal law prohibiting use of the hitching post. Pet. App. 12 (quoting *Hill* v. *DeKalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1185 (11th Cir. 1994)). The court "recognize[d] that the inappropriateness of the hitching post could be inferred from" Eleventh Circuit precedent. *Id.* at 12. But the court stated that "[i]t is important to analyze the facts in these cases, and determine if they are 'materially similar' to the facts in the case in front of us." *Id.* at 13 (quoting *Suissa* v. *Fulton County*, 74 F.3d 266, 269-270 (11th Cir. 1996) (per curiam)). The relevant precedential decisions, the court of appeals concluded, did not establish the governing Eighth Amendment rule with sufficient clarity to defeat respondents' assertions of qualified immunity because these decisions involved facts that, although "analogous," were "not 'materially similar' to [petitioner's] situation." *Id.* at 13.

5. This Court granted certiorari on January 4, 2002. On January 29, 2002, the Court limited its grant of the petition to two questions formulated by the Court, which are stated above on page I of this Brief.[6]

[5] The court of appeals did not address due process issues. See Pet. App. 3 n.3. Petitioner does not challenge that aspect of the court of appeals' decision and appears to rely only on the Eighth Amendment as the basis for his claim under Section 1983. See Pet. 1-2.

[6] This Court has directed lower courts to consider, as "the initial inquiry" in qualified immunity analysis, whether there would be a constitutional violation if the plaintiff's allegations were estab-

SUMMARY OF ARGUMENT

1. The touchstone of qualified immunity analysis is whether the defendant official has violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). A claim of immunity must be upheld unless, at the time of the asserted violation, settled law "clearly proscribed" the officers' alleged actions. *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985). In the case of an especially egregious violation of a clearly stated constitutional provision, a claim to official immunity might fail even though courts have never before had occasion to enforce the relevant constitutional right on materially similar facts. Where a violation of a broadly stated constitutional provision is alleged, however, a legal rule of the requisite clarity and specificity generally must be found, if at all, in judicial decisions. In that situation the facts of the earlier court case(s) need not be exactly the same as the facts of the alleged violation. To overcome a claim of qualified immunity based on judicial precedent, however, the plaintiff must identify authoritative decisions that establish, with obvious clarity, that the defendant's alleged conduct violated constitutional rights.

2. Viewing the record in this case in the light most favorable to petitioner and drawing all inferences most favorable to him, respondents' use of the hitching post

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lished. See *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001). In this case and others (see, *e.g.*, *id.* at 2155, 2159), however, this Court has granted certiorari on qualified immunity issues but not on the underlying constitutional claim, presumably because only the former satisfies the criteria for this Court's exercise of certiorari jurisdiction. See Sup. Ct. R. 10. This Brief addresses only the qualified immunity issues on which the Court has granted certiorari.

against petitioner violated clearly established Eighth Amendment rights of which a reasonable officer would have known. Controlling Eleventh Circuit precedent clearly stated that disciplining an inmate who is not resisting authority by handcuffing him to a fixed object for a long period of time, or forcing him to stand in an awkward position for a long period of time, violates the Eighth Amendment. This precedent was materially similar to the instant case in that it provided clear notice of the relevant constitutional rule and no reasonable officer could have thought that the prolonged, painful, and punitive use of the hitching post that allegedly occurred on June 7, 1995, was lawful. The court of appeals reached a contrary conclusion by placing undue weight on the factual and procedural contexts of its controlling cases, without giving due significance to their holdings. On the limited record before it, the district court should not have granted summary judgment for all respondents on qualified immunity grounds.

ARGUMENT

I. A QUALIFIED IMMUNITY DEFENSE CAN SOMETIMES BE DEFEATED EVEN IN THE ABSENCE OF CASE LAW PRESENTING MATERIALLY SIMILAR FACTS

A. Official immunity is rooted in the policy consideration that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at

all." *Id.* at 242; see *Saucier* v. *Katz*, 121 S. Ct. 2151, 2158 (2001) ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct.").

Qualified immunity serves to ensure that officials do not "exercise their discretion with undue timidity." *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975); see *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984) (qualified immunity doctrine allows officers to "act without fear of harassing litigation"). It affords "'room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 343, 341 (1986)).

B. Implementing those principles, this Court held in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), that qualified immunity prevents a federal official sued in his personal capacity from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The same rule applies in a suit against a state or local official under 42 U.S.C. 1983 (1994 & Supp. V 1999). 457 U.S. at 818 n.30; see *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). Thus, even when a state or local official errs and violates the Constitution, immunity shields the officer from liability and suit under Section 1983 unless, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley*, 475 U.S. at 341. "[I]f officers of reasonable competence could disagree on" the lawfulness of the conduct, then "immunity should be recognized." *Ibid.*

In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court addressed the level of generality at which the qualified immunity inquiry must take place. The court of appeals there had held that immunity was unavailable to an officer who allegedly conducted a warrantless search of a home, reasoning that it was clearly established that such searches are unconstitutional absent probable cause and exigent circumstances. *Id.* at 638. This Court reversed, ruling that immunity may not be denied merely because the governing legal principle was clearly established at a high level of generality. *Id.* at 639.

The *Anderson* Court explained that immunity may not be denied in a due process case, for example, simply because "the right to due process of law is quite clearly established by the Due Process Clause." 483 U.S. at 639. Instead, immunity may be denied only if "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "This is not to say," the Court continued, "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Rather, "the unlawfulness must be apparent" in light of pre-existing law. *Ibid.* Applying those principles, this Court held in *Anderson* that the court of appeals should have examined the "fact-specific" question of "whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at 641; see *id.* at 638 ("Our cases * * * generally provid[e] government officials * * * with a qualified immunity

* * * as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.").

In *United States* v. *Lanier*, 520 U.S. 259 (1997), the Court further addressed the level of specificity that must be present in a governing legal rule in order for there to be "clearly established" law. *Lanier* involved a criminal prosecution under 18 U.S.C. 242, which makes it unlawful to act willfully and under color of state law to deprive a person of federal constitutional or statutory rights. See 520 U.S. at 264. The court of appeals had held that criminal liability may not be imposed under Section 242 for deprivation of a constitutional right unless this Court had applied the same right "in 'a factual situation fundamentally similar to the one at bar.'" *Id.* at 263 (quoting *United States* v. *Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1986)).

This Court reversed. It explained that the critical consideration is whether "broad constitutional requirements have been 'made specific' by the [constitutional] text or settled interpretations," such that potential criminal violators of Section 242 had "fair warning" of what was prohibited at the time of the charged conduct. 520 U.S. at 267 (quoting *Screws* v. *United States*, 325 U.S. 91, 104 (1945)). The Court concluded that "[n]either a decision of this Court [n]or the extreme level of factual specificity envisioned by the Court of Appeals is necessary in every instance to give fair warning." *Id.* at 268. Indeed, the Court noted that it had upheld convictions under Section 242 "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 269.

The *Lanier* Court compared the fair-warning standard that applies in criminal prosecutions under Section 242 to the "'clearly established' law" standard that applies to claims of qualified immunity in civil suits under Section 1983 or *Bivens*. 520 U.S. at 270. Both tests "serve the same objective," the Court held, "and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* at 270-271.

Drawing on qualified immunity cases, the Court held that "general statements of the law are not inherently incapable of giving fair and clear warning" and that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640). The Court concluded that under Section 242, as in qualified immunity cases, "all that can usefully be said * * * is that [liability] may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness under the Constitution is apparent.'" *Id.* at 271-272 (quoting *Anderson*, 483 U.S. at 640) (brackets omitted). Thus, as the Court reiterated last Term in *Saucier* v. *Katz*, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." 121 S. Ct. at 2156; see *id.* at 2156-2157 ("If the law did not put the officer on notice that his conduct would be clearly

unlawful, summary judgment based on qualified immunity is appropriate.").

C. *Harlow*, *Anderson*, and *Lanier* answer the first question posed in this case. Those decisions establish that government officials are not immune from liability for clear constitutional violations simply because courts have never had occasion to enforce the relevant constitutional right on materially similar facts. Some constitutional violations are obvious whether or not they have been addressed in reported cases. For example, the Thirteenth and Fourteenth Amendments would put any reasonable state welfare official on notice that selling foster children into slavery is clearly unconstitutional. There accordingly would be no official immunity from Section 1983 liability for such a constitutional violation—whether or not a case with similar facts had ever before arisen. *Lanier*, 520 U.S. at 271; see U.S. Const. Amend. XIII, § 1, and Amend. XIV, § 2. Likewise, case law addressing materially similar facts would be unnecessary to defeat a claim of immunity if state officials conceived and implemented a plan to disenfranchise female voters on account of their sex, in plain violation of the Nineteenth Amendment.[7]

In the ordinary case, however, the claimed constitutional right is not unequivocally set out in the text of the Constitution itself with a sufficient level of specificity to satisfy the requirement that officers have clear

[7] In other cases, the Eleventh Circuit has recognized this rule. See *Smith* v. *Mattox*, 127 F.3d 1416, 1419 (1997) (plaintiff can overcome qualified immunity by showing "that the official's conduct lies so obviously at the very core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw."); *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (2000) (same).

notice of the unlawfulness of their conduct. Case law therefore will be necessary to make the constitutional right specific and to establish the contours of the right with sufficient clarity for purposes of qualified immunity analysis. In that situation, "[t]he relevant, dispositive inquiry" is whether the case law would make it "clear to a reasonable officer that his conduct was unlawful in the situation" at issue in the lawsuit. *Saucier*, 121 S. Ct. at 2156.

That question must be answered with regard for both the authoritativeness of any relevant judicial decisions and whether the decisions arose on "facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 121 S. Ct. at 2157. Decisions that are not controlling in the relevant jurisdiction generally will not suffice to establish a clear legal rule unless they establish "a consensus * * * of persuasive authority." *Wilson*, 526 U.S. at 617; see *id.* at 618 (where courts of appeals differ on a constitutional question, "it is unfair to subject police to money damages for picking the losing side of the controversy"); see also *Lanier*, 520 U.S. at 269 (finding no "need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide [fair warning of a constitutional rule]"). But when there is a controlling decision on-point or a consensus of persuasive authority establishing the governing legal rule, insignificant factual variations from the case at issue will not allow the defendant officer to obtain immunity. A government official could not establish immunity if such judicial authority stated a constitutional rule that "appl[ied] with obvious clarity to the specific conduct in question, even though the very action in question" had never been addressed by

the courts. *Id.* at 271 (internal quotation marks omitted).

Consistent with those principles, the Eleventh Circuit has required the facts of the judicial authority that is relied upon to defeat a claim of qualified immunity to be "materially similar" to the facts at issue. *Suissa* v. *Fulton County*, 74 F.3d 266, 270 (11th Cir. 1996) (internal quotation marks omitted). Other circuits have developed similar rules. The Tenth Circuit, for example, requires that "there be some, but not necessarily precise, factual correspondence between previous cases and the case at bar." *Calhoun* v. *Gaines*, 982 F.2d 1470, 1475 (1992). The First Circuit requires "fairly analogous precedents." *Horta* v. *Sullivan*, 4 F.3d 2, 13 (1993). The Seventh Circuit demands "case law in a closely analogous area." *Lojuk* v. *Johnson*, 770 F.2d 619, 628 (1985), cert. denied, 474 U.S. 1067 (1986). When properly applied, such tests are fully consistent with this Court's decisions addressing qualified immunity. But proper application of those tests requires the search for "materially similar" cases to remain part of the ultimate inquiry into whether the constitutional right at issue was established with sufficient clarity to put a reasonable officer on notice.

There is a danger—suggested by this case, see Part II, *infra*—that the search for materially similar decisions may take on a life of its own and override the principle that official conduct can be both novel and clearly unconstitutional, see *Lanier*, 520 U.S. at 271. The search for materially similar cases, moreover, must encompass both the facts and the holdings of relevant precedents. If an earlier case establishes a bright-line rule, then factual disparities between that case and a later case will be immaterial unless the differences put the conduct in the later case outside the scope of the

bright-line prohibition. By contrast, if precedent establishes that a constitutional judgment depends on the totality of the circumstances in the particular case, then factual variations between the precedent and the case being litigated likely will have greater importance.

For those reasons, a search for materially similar cases is particularly useful (indeed, necessary) when dealing with constitutional norms that are defined at high levels of generality. For example, the constitutional principles that officers must have probable cause to conduct a search and that exigent circumstances excuse a search warrant are not self-executing. See *Anderson*, 483 U.S. at 641. The rule that officers may not use unreasonable force when making an arrest likewise can only provide concrete guidance when it is made specific in particular cases. See *Saucier*, 121 S. Ct. at 2158. Where, however, the case law provides clear guidance and bright-line rules, factual differences are less relevant. The degree of factual difference that precludes a finding of material similarity therefore depends in part on the extent to which the relevant legal rules—as established by the Constitution and the case law—themselves provide officers clear guidance.

II. THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S LAWSUIT ON QUALIFIED IMMUNITY GROUNDS WAS ERROR

Viewing all disputed facts in the light most favorable to petitioner and drawing inferences in his favor, see *Harlow*, 457 U.S. at 816 n.26, petitioner's claim in this case rests primarily upon the incident on June 7, 1995. On that day, one or more respondents punished petitioner for fighting with a guard by handcuffing petitioner to a hitching post with his wrists at about head-

height, for approximately seven hours in hot weather, while taunting him, denying him any bathroom break, and giving him just one or two drinks of water. That corporal punishment caused petitioner physical pain and made his wrists swollen and bruised. See 11/3/97 Second Aff. of Larry Hope; Pet. App. 2-3, 6, 10; Pet. Supp. App. 12, 13-15.[8]

Under this Court's two-step procedure for considering qualified immunity claims, the "threshold" inquiry when asking whether there was a violation of clearly established rights is whether the alleged facts show a constitutional violation. See *Saucier*, 121 S. Ct. at 2156. The court of appeals held in this case that "[t]he practice of leaving an inmate cuffed to a hitching post when he no longer presents a threat to himself or those around him is a violation of that prisoner's Eighth Amendment rights, particularly when he is denied water and bathroom breaks." Pet. App. 13. For purposes of this case, the correctness of that ruling is unchallenged and may be assumed. See note 6, *supra*.

"[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 121 S. Ct. at 2156. Respondents' ability to obtain summary judgment on qualified immunity grounds therefore depends on whether a rea-

[8] On June 7, 1995, the high temperature in Huntsville, Alabama (approximately 15 miles from the Limestone prison) was 88 degrees. See <http://www.wunderground.com/history/airport/KHSV/1995/6/7/DailyHistory.html>. Respondent was without a shirt at least part of the day. See Compl. Exh. 1, at 2 (petitioner's affidavit dated Mar. 26, 1996, alleging that officers made him take off his shirt); but see 11/3/97 Second Aff. of Larry Hope ¶ 15 & Exhs. 3-4 (photographs showing petitioner wearing a shirt while shackled to a hitching post).

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sonable officer could have thought that the alleged use of the hitching post was lawful in light of clearly established law and the factual information respondents possessed at the time. See *Anderson*, 483 U.S. at 641.

No reasonable officer could have thought that the alleged prolonged, painful, and punitive use of the hitching post on June 7 was lawful. The court of appeals recognized that at least two of its precedential decisions addressed "analogous" factual situations. Pet. App. 13. The court, however, erroneously dismissed the notice provided by those cases by focusing inordinately on their factual contexts and paying too little attention to the legal principles they established.

In *Gates* v. *Collier*, 501 F.2d 1291 (1974), the Fifth Circuit (before being split into the Fifth and Eleventh Circuits, see Pet. 7, n.2) addressed a record "replete with innumerable instances of physical brutality and abuse in disciplining inmates who were sent to [the Mississippi State Penitentiary]." 501 F.2d at 1306. The court of appeals identified specific practices that, it held, "[u]nquestionably" violated the Eighth Amendment. *Ibid.* Those practices included "handcuffing inmates to the fence and to cells for long periods of time" and "forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods." *Ibid.*

The court of appeals distinguished *Gates* as a case "involv[ing] an effort to make substantial changes" in numerous prison conditions. Pet. App. 13. But the broad scope of the plaintiffs' requested relief in *Gates* does not lessen the force of the Fifth Circuit's *holding* that "handcuffing inmates to the fence and to cells for long periods of time" and forcing them to "maintain awkward positions for prolonged periods" violated the Eighth Amendment. 501 F.2d at 1306. And to the ex-

tent that the court of appeals may have found *Gates* inapplicable because it involved handcuffing inmates to fences and prison cells rather than the use of a hitching post, see Pet. App. 13, the court ignored that a constitutional rule "already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Lanier*, 520 U.S. at 271 (internal citation and quotation marks omitted). No reasonable officer could have concluded that the constitutional holding of *Gates* turned on the fact that inmates were handcuffed to fences or the bars of cells, rather than a specially designed metal bar designated for shackling. If anything, the use of a designated hitching post highlights the constitutional problem. Accordingly, the *Gates* case is materially similar in that it should have put respondents on notice that their conduct was unlawful, even if the facts were not identical.[9]

Ort v. *White*, 813 F.2d 318 (11th Cir. 1987), provided respondents additional notice. The plaintiff inmate in

[9] The Eleventh Circuit's reliance on fine factual distinctions between this case and *Gates* is at odds with other decisions of the Eleventh Circuit. In *Skrtich* v. *Thonton*, No. 00-15959, 2002 WL 111299 (11th Cir. Jan. 29, 2002), for instance, an unruly prisoner who already had been subdued was beaten by prison guards. Rejecting a claim to immunity, the court of appeals held that the relevant circumstances were "a non-compliant inmate who had been restrained by the guards and no longer posed a threat." *Id.* at *4. Those circumstances, in the court's view, "were enough like the facts in precedent that no reasonable, similarly situated official could believe that the factual differences * * * might make a difference to the conclusion about whether the official's conduct was lawful." *Ibid.* The court of appeals further explained that "[t]he fact that the beating took place in the context of a cell extraction does not materially distinguish this case from our precedent." *Ibid.*

Ort alleged, in relevant part, that Alabama prison officials violated his Eighth Amendment rights by denying him drinking water when he refused to do prison work or to help carry the work squad's water container. *Id.* at 320-321. In addressing the inmate's claims, the Eleventh Circuit approved a district court's holding—based on Fifth Circuit decisions that are themselves precedent in the Eleventh Circuit—that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation." *Id.* at 324 (discussing *Smith* v. *Dooley*, 591 F. Supp. 1157 (W.D. La. 1984), aff'd, 778 F.2d 788 (5th Cir. 1985)). Furthermore, the Eleventh Circuit clarified, "[p]rison officials step over the line of constitutionally permissible conduct if they use more force than is reasonably necessary in an existing [disciplinary] situation or if they summarily and maliciously inflict harm in retaliation for past conduct." *Id.* at 325. The court of appeals held (*id.* at 325-326) that the denial of water to Ort at his work site was not an Eighth Amendment violation under the exigent circumstances of that case. But it cautioned that a constitutional violation might have been present "if later, once back at the prison, officials had decided to deny [Ort] water as punishment for his refusal to work." *Id.* at 326.

Like its consideration of *Gates*, the court of appeals' consideration of *Ort* (Pet. App. 13) was inadequate. The significance of *Ort* for purposes of the qualified immunity inquiry in this case is not—as the court of appeals suggested—that both cases involved work squads and drinking water. Rather, *Ort* is significant mainly for its warning against physically abusing a prisoner who is not resisting authority (813 F.2d at 324-325), which reinforced the relevant holdings of *Gates*.

The court of appeals therefore erred in ruling that *Gates* and *Ort* were too dissimilar from this case to provide respondents clear guidance. Despite minor differences in the factual contexts, *Gates*, read together with *Ort*, gave reasonable officers clear notice in 1995 that, when there is no prison disturbance or other ongoing threat, it violates the Eighth Amendment to punish an inmate by handcuffing him to a fixed object with his wrists at about head-height for approximately seven hours while denying him bathroom breaks and severely limiting his access to water. The facts of *Gates* and *Ort* are not identical to those in this case, but together those decisions provided respondents with clear notice of the applicable constitutional rules.

Respondents' alleged use of the hitching post—for a punitive purpose, without giving petitioner an opportunity to return to work, and accompanied by denial of drinking water and bathroom breaks—also violated the requirements of Regulation 429. See pp. 3-5, *supra* (discussing regulation). A violation of Alabama prison regulations could not alone establish an Eighth Amendment violation. See *Davis* v. *Scherer*, 468 U.S. at 193-194 & nn.11, 12. But respondents' alleged failure to follow prison policy does foreclose the argument that, if the state policy itself was arguably constitutional, then respondents' conduct necessarily did not violate clearly established law. This is not a case where the defendants reasonably relied on an administrative policy in carrying out their allegedly illegal acts. Cf. *Wilson*, 526 U.S. at 617 (where relevant law was undeveloped, "it was not unreasonable for law enforcement officers to look and rely on" an administrative policy).

Contrary to respondents' argument (Br. in Opp. 12-15), moreover, reasonable officers in respondents' position could not have relied on the magistrate judge's

Report and Recommendation in *Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala. Jan. 24, 1994) (*Whitson* Report), to conclude that the alleged treatment of petitioner was lawful.[10] The magistrate judge in *Whitson* found that prison officials who had handcuffed an inmate to a hitching post for eight hours in hot weather without water or bathroom breaks were entitled to qualified immunity because, as of July 1993, "there was no clearly established law identifying this practice as unconstitutional." Br. in Opp. 14 (quoting *Whitson* Report 7). Unlike the alleged facts in this case, however, the defendant officers in *Whitson* "gave [the inmate] the choice of either working or being handcuffed to the security bar." *Whitson* Report 10. As respondents put it, the prisoner in such a situation "in effect, holds the keys to his freedom from the restraint bar." Br. in Opp. 16. The magistrate judge in *Whitson*, moreover, did not evince any awareness of the Fifth Circuit's decision in *Gates*. See *id.* at 7- 11. Given the legally important factual difference between *Whitson* and this case, and given the magistrate judge's failure to consider *Gates*, no reasonable officer would have understood the *Whitson* Report's conclusion that the existence of a constitutional violation in *that* case was "debatable" (*id.* at 11) as indicating that the alleged punishment of petitioner in *this* case might be lawful.[11]

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[10] The magistrate judge's report and recommendation in *Whitson* were accepted by the district court. See Order Granting Summary Judgment and Dismissing the Action, *Whitson* v. *Gillikin*, No. CV-93- H-1517-NE (N.D. Ala. Feb. 15, 1994).

[11] Respondents also cite (Br. in Opp. 12) the 1998 magistrate judge's report in *Hudson* v. *James*, No. CV-96-D-1266-N (M.D. Ala. Oct. 14, 1998). That report was issued after the relevant events in this case and has no significance when assessing the state of the law in 1995. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 530

On the limited record before it and absent further discovery, the district court should not have granted summary judgment for all respondents, on qualified immunity grounds, as to petitioner's Eighth Amendment claim. The district court should, at a minimum, have considered the alleged involvement of each respondent officer in events that violated the clearly established rules of *Gates* and *Ort*. See Pet. Supp. App. 12-15 (discussing petitioner's allegations and respondents' factual affidavits); cf. *Saucier*, 121 S. Ct. at 2160, 2161-2162 (Ginsburg, J., concurring in the judgment). Discovery on the qualified immunity issue also may be necessary. See *Anderson*, 483 U.S. at 646-647 n.6. But if such future discovery failed to uncover facts that establish a genuine issue as to whether respondents violated clearly established law, respondents would be entitled to immunity and summary judgment at that time. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

CONCLUSION

The court of appeals in this case lost sight of the ultimate question of whether a reasonable officer would have had clear notice that his conduct violated the Constitution. The court of appeals asked a relevant question when it inquired whether the relevant Eleventh Circuit precedents were materially similar to this case. It gave undue weight, however, to the factual and procedural contexts of its precedents and paid too little attention to the guidance provided by their holdings. Viewed in light of their holdings, *Gates*

(1985). The magistrate judge in *Lane* v. *Findley*, No. CV 93-C-1741-S (N.D. Ala. Aug. 4, 1994), found no Eighth Amendment violation where an inmate was shackled to a hitching post for five hours, but "was given food, water, and the opportunity to use toilet facilities." *Id.* at 9.

and *Ort* are "materially similar" to the case at hand. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

LARRY HOPE,

Petitioner,

—v.—

MARK PELZER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ALABAMA, THE ACLU OF FLORIDA, AND THE ACLU OF GEORGIA, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether state officials sued in their individual capacities under 42 U.S.C. §1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts materially similar to those in the plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. §1983.

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to protecting the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of that goal, the ACLU is frequently involved in litigation against government officials where issues of qualified immunity arise, both in this Court and in the lower state and federal courts. The ACLU of Alabama, the ACLU of Florida, and the ACLU of Georgia are statewide affiliates of the national ACLU located in the Eleventh Circuit. The qualified immunity standard applied by the Eleventh Circuit has directly affected each of their programs.

STATEMENT OF THE CASE

Petitioner, Larry Hope, an inmate assigned to a chain gang at the Limestone Correctional Facility in Alabama in 1995, was twice handcuffed to a "restraining bar," also known as a "hitching post," as punishment for disruptive behavior. *Hope v. Pelzer*, 240 F.3d 975, 977 (11th Cir. 2001). The hitching post is a horizontal bar "made of sturdy, non-flexible material" placed either 45 or 57 inches above the ground. *Austin v. Hopper*, 15 F.Supp.2d 1210, 1241 (M.D. Ala. 1995). "Hope was cuffed standing to a hitching post, with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet." 240 F.3d at 978. According to Alabama Department of Corrections (DOC) policy, the hitching post is to be used to "eliminate the possibility of disruption of the work squad and to discourage other inmates from exhibiting similar conduct." *Hope*, 240 F.3d. at 978. It is by definition, then, a punitive device.

Hope filed suit against eight guards under the Eighth Amendment and 42 U.S.C. §1983. The federal District Court for the Middle District of Alabama dismissed Hope's action because of the guards' qualified immunity. 240 F.3d at 977. On appeal, the United States Court of Appeals for the Eleventh Circuit concluded that "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment." *Id.* at 980. In support of that conclusion, it noted that the Department of Justice advised prison authorities in 1994 that the hitching post was unconstitutional. *Id.* at 979. Even without that explicit advisory, the Eleventh Circuit held, "a factfinder [could] conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious," *id.* at 978, and that the hitching post's illegality "could be inferred from [prior] opinions." *Id.* at 981. Yet, notwithstanding its finding that the risk presented by the hitching post "was obvious" and that the unconstitutionality of defendants' actions "could be inferred" from prior opinions, the court of appeals ruled that the defendants were entitled to qualified immunity. "Despite the unconstitutionality of the prison practice and, therefore, the guards' actions, there was no clear, bright-line test established in 1995 that would survive our circuit's qualified immunity analysis." *Id.* Under the Eleventh Circuit's qualified immunity rules, "it is important to analyze the facts in these [prior] cases, and determine if they are 'materially

similar' to the facts in the case in front of us. Though analogous, the facts . . . are not 'materially similar' to Hope's situation." *Id.* Only "preexisting, obvious and mandatory" precedent, according to the Eleventh Circuit, satisfies this standard. *Id.*

SUMMARY OF ARGUMENT

The Eleventh Circuit's "materially similar" test is inconsistent with this Court's qualified immunity jurisprudence. The touchstone of qualified immunity is "fair warning," as opposed to "factual identity." The Eleventh Circuit's "materially similar" test, in practice, demands precise factual identity, a rarity in constitutional litigation. Because the Eleventh Circuit's analysis creates an almost impregnable shield, there is little reason for officials to comply with constitutional standards. The Eleventh Circuit compounds its error by limiting its search for materially similar cases to the Supreme Court, the Eleventh Circuit and the supreme court of the state where the case arose. Contrary to the Eleventh Circuit's position, this Court has made it plain that a consensus of persuasive cases, even if they arise in other jurisdictions, can sufficiently establish the relevant law to defeat a claim of qualified immunity.

The use of prolonged physical restraints for punitive purposes was clearly unconstitutional in 1995. The last century witnessed the abandonment of stocks, stakes and pillories as arcane punitive devices that proved contrary to civilized society's evolving notions of decency. No state other than Alabama uses restraining bars or hitching posts to punish prisoners. The Department of Justice notified Alabama officials in 1994 that the hitching post was inconsistent with Eighth Amendment standards. Professional standards promulgated by the American Correctional Association (ACA) and the American Bar Association (ABA) caution against

the use of physical restraints as punishment. International law likewise prohibits their use for punitive purposes. No reasonable person could have believed in the mid-1990s that the Constitution tolerated summarily chaining inmates to hitching posts for hours on end for disciplinary purposes.

ARGUMENT

I. The Eleventh Circuit's Fact-Specific, "Materially Similar" Analysis Is Inconsistent With This Court's "Fair Warning" Standard

Executive officials performing discretionary functions are personally liable for violating "clearly established statutory or constitutional rights of which a reasonable person would have known." *Burns v. Reed*, 500 U.S. 478, 495 n.8 (1991)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Crawford-El v. Britton*, 523 U.S. 574, 587-88 (1998). This "qualified immunity" defense consists of two inquiries: the first is whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, __, 121 S.Ct. 2151, 2153 (2001). The second is whether the wrongdoer should have known that her conduct violated this constitutional standard given the facts presented. *See id.* at 2159 ("The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards"). Because "[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made," *id.* at 2153, the ultimate question is whether "the officer's mistake as to what the law requires is reasonable." *Id.* at 2158.

As this Court's recent decision in *United States v. Lanier* explained, qualified immunity's "reasonable mistake" standard closely parallels vagueness principles grounded in the Fifth and Fourteenth Amendments' Due Process Clauses:

> [T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

520 U.S. 259, 270-71 (1997). The Court in *Lanier* thus rejected the view that public officials can be held liable for constitutional violations only if the contours of the right have been defined with particularity in a case with "fundamentally similar" facts. *Id.* at 269. While "prior decisions [can give] reasonable warning that the conduct then at issue violated constitutional rights," the "very action in question" need not have "previously been held unlawful." *Id.* at 268-71.

Just as criminal defendants are entitled to constructive notice that their conduct is prohibited, the qualified immunity defense insures that government officials receive "fair warning" before being held civilly liable. Absolute certainty is not necessary in either context, nor is unanimous judicial agreement on the verbal formulation of the controlling standard (whether criminal or constitutional): "Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard." *Saucier*, 121 S.Ct. at 2157.

Some rights, like an African-American's right to be free from invidious racial discrimination, have been so thor-

oughly litigated that their contours are clear in virtually every context imaginable. *See, e.g., Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997)("fit has been clearly established for many years that the Equal Protection Clause prohibits a State, when acting as an employer, from invidiously discriminating between individuals or groups based upon race"); *Tang v. State of Rhode Island, Dep't of Elderly Affairs*, 120 F.3d 325, 327 (1st Cir. 1997).[2] Other rights may not have been as thoroughly litigated but are nonetheless clearly established based on a set of universal, unchallenged norms or understandings. The Seventh Circuit in *Brokaw v. Mercer County*, for example, concluded that

> a plaintiff need not always identify a closely analogous case; rather, he can establish a clearly established constitutional right by showing that the violation was *so obvious* that a reasonable person would have known of the unconstitutionality of the conduct at issue. Thus, binding precedent is not necessary to clearly establish a right. In fact, in the most extreme cases, *an analogous case might never arise because "the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in the state courts, that no one thought it worthwhile to litigate the issue."*

[2] *See* John C. Jeffries, Jr., "Disaggregating Constitutional Torts," 110 Yale L. J. 259, 277 (2000)("Someone who purposely discriminates against racial minorities cannot claim that he or she reasonably thought such action to be lawful. The defense is irrelevant because it is factually incredible"); Barbara E. Armacost, "Qualified Immunity: Ignorance Excused," 51 Vand. L. Rev. 583, 591 (1998)("Today, discrimination against someone because she is African-American or Hispanic is viewed as inherently and obviously 'bad' behavior, obviating the need for qualified immunity in a case alleging such discrimination").

235 F.3d 1000, 1022 (7th Cir. 2000)(citations omitted and emphasis added). *See also May v. Sheahan*, 226 F.3d 876, 882 (7th Cir. 2000)("a perfect match with the facts of a prior case is not required to defeat a qualified immunity claim"). The court in *Brokaw* thus had little difficulty denying qualified immunity to officials who had improperly removed a child from his parents' home, notwithstanding the lack of binding decisions precisely on point. Qualified immunity is justified when rights are truly in doubt. When they are not, either because of clear precedent or common understanding, immunity should be denied.

A. The Eleventh Circuit Test For Qualified Immunity Treats Minor Factual Distinctions As More Important Than Enforcement Of Prevailing Constitutional Norms

By requiring a civil rights plaintiff to show the existence of a prior decision involving nearly identical facts in order to recover damages for a constitutional wrong, the Eleventh Circuit has effectively converted qualified immunity into absolute immunity for numerous government officials. When Justice Holmes spoke of "fair warning," he meant "language that the common world will understand." *Lanier*, 501 U.S. at 265 (citation omitted). He did not mean, and the law has never been construed to require, precise and unmistakable directions parsing every conceivable combination of facts.

Yet, that is the practical effect of the Eleventh Circuit's qualified immunity analysis: "only in exceptional cases will government actors have no shield against claims made against them . . . ." *Lassiter v. Alabama Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994)(*en banc*).[3]

[3] *See also Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 n.3 (continued...)

Rather than search for common world understandings, the Eleventh Circuit demands legal precision and factual identity: "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Rowe v. Fort Lauderdale*, 2002 WL 86675 (11th Cir. Jan. 23, 2002)(quoting *Lassiter*, 28 F.3d at 1150). *Arguable* differences in *minor* facts are enough to defeat liability:

> [*M*]*inor variations* in some facts (the precedent lacks an *arguably significant* fact or contains an additional *arguably significant* fact not in the circumstances now facing the official) might be very important and, therefore, be able to make the circumstances facing an official materially different from the preexisting precedents, leaving the law applicable -- in the circumstances facing the official -- not clearly established when the defendant official acted.

Marsh v. Butler County, 268 F.3d 1014, 1032 (11th Cir. 2001)(emphasis added).

Just how differently this standard functions in practice from *Lanier*'s fair warning standard is demonstrated by the Eleventh Circuit's *en banc* reversal of Judge Kravitch's panel decision in *Jenkins v. Talladega City Bd. of Educ.*, 95 F.3d 1036 (11th Cir. 1996), *reversed*, 115 F.3d 821 (11th Cir. 1997)(*en banc*). In her panel opinion, Judge Kravitch

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[3] (...continued)
(11th Cir. 1997)(*en banc*)(refusing to reconsider Eleventh Circuit test in light of *Lanier*); *Gonzalez v. Lee County Housing Auth.*, 161 F.3d 1290, 1295 (11th Cir. 1998)("[t]his circuit has established stringent standards for a plaintiff seeking to overcome the affirmative defense of qualified immunity").

concluded that school officials who strip-searched two eight-year-old second graders were not entitled to qualified immunity. She explained that *Lassiter*'s "materially similar" standard "has been misconstrued as announcing a sweeping change." 95 F.3d at 1040. It "has been read by some to indicate that qualified immunity is due every official unless this court has addressed essentially identical facts in a previous case." *Id.* This, Judge Kravitch argued, was not the purpose of qualified immunity: "To treat each set of facts as unique and legally indeterminate would make qualified immunity absolute . . . ." *Id.* Judge Kravitch instead read the Supreme Court's qualified immunity precedent to allow for common sense: where "the official misconduct is more egregious than conduct of the same general type that has been deemed illegal in other cases," and where "application of the legal standard would necessarily lead reasonable officials in the defendant's situation to but one inevitable conclusion," immunity is lost. *Id.* at 1041. Even though no court had previously held school officials liable under identical facts, because the school officials "acted in blatant disregard of the Fourth Amendment," *id.* at 1048, they could not credibly claim immunity. In so ruling, Judge Kravitch joined a majority of circuits in recognizing that nothing is served by excusing blatant wrongdoing. *See, e.g.*, *Ayani v. Mottola*, 35 F.3d 680 (2d Cir. 1994); *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995); *Brokaw v. Mercer County*, 235 F.3d 1000.

Her opinion did not last for long, however. The *en banc* majority rejected Judge Kravitch's reasoning on the theory that "neither the Supreme Court nor any court in this circuit nor the Alabama courts . . . had ever actually applied the test established in [*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)] to define a reasonable (or unreasonable) search in the context of facts materially similar to those of this school search . . . . [S]chool officials cannot be required to con-

strue general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority." 115 F.3d at 826-27. Whether the strip searches were more egregious than previously defined wrongs was not controlling nor even relevant. Nor was the fact that a reasonable official would "inevitably" conclude that strip searches under these facts were impermissible. Only an identical case, according to the *en banc* court, defeats qualified immunity. It is fair to surmise that had Judge Lanier extorted sexual favors from his victims in Florida, Georgia or Alabama, he would have been immune from §1983 liability.[4]

Like the Sixth Circuit test rejected in *Lanier*, the Eleventh Circuit's test for qualified immunity applies the "wrong gauge" to the qualified immunity question. Combing prior opinions for "arguable," "minor" differences serves no purpose other than to insulate blatant wrongdoing.[5]

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[4] In the civil analog to the criminal prosecution of Judge Lanier, the Sixth Circuit concluded he was not entitled to absolute judicial immunity. *See Archie v. Lanier*, 95 F.3d 438 (6th Cir. 1996). By contrast, the Eleventh Circuit would very likely extend Judge Lanier qualified immunity, since no similar case has ever been litigated in Alabama, Georgia or Florida. *See Lewis v. McDade*, 250 F.3d 1320, 1321 (11th Cir. 2001)(Barkett, J., dissenting from denial of rehearing *en banc*)(discussed *infra* at IB).

[5] *Amici* recognize, of course, that qualified immunity is not available in injunction actions and cannot be raised by municipal defendants, even in damage actions. An injunction, however, is a forward-looking remedy that does not make the plaintiff whole. Moreover, under this Court's jurisprudence, a plaintiff seeking injunctive relief must allege an ongoing constitutional violation. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)(holding that victim of chokehold had no standing to seek injunctive relief because he could not demonstrate he would be choked again). Similarly, municipal liability demands proof of a local policy or custom, which will rarely exist when officials engage in patent wrongdoing. Be-

(continued...)

B. The Eleventh Circuit's "Materially Similar" Test, As Applied, Consistently Deviates From *Lanier*'s "Fair Warning" Standard

The Eleventh Circuit's "materially similar" standard seriously impairs victims' ability to redress constitutional wrongs. Even patent wrongs are insulated by minor factual distinctions. Judge Barkett's description of the factual record in *Lewis v. McDade*, 250 F.3d 1320, 1321 (11th Cir. 2001)(Barkett, J., dissenting from denial of rehearing *en banc*), offers one illustration of a persistent problem:

> [The defendant] "ran a DA's office rife with gender-discrimination," . . . (1) berating his female employees with pejorative terms such as "hysterical female," "bitch," "blonde bombshell," "smurfette," and "bimbette," (2) photographing his female employees' buttocks, (3) throwing coins and other objects down his female employees' blouses, (4) telling a female employee to uncross and cross her legs again while he watched, (5) stating that the only thing women are good for is "making babies," (6) saying "women don't have the balls to be prosecutors," and (7) embarrassing his female employees with statements such as "you can't come in, Rita doesn't have her clothes on," . . . .

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[5] (...continued)
cause "[b]oth forms of relief require a concrete policy, [] more often than not [] the victim of constitutional wrongdoing [is] left without relief of any sort." Mark R. Brown, "The Failure of Fault Under §1983: Municipal Liability for State Law Enforcement," 84 Cornell L. Rev. 1503, 1537-38 (1999).

Despite these facts, the Eleventh Circuit ruled that "qualified immunity protects [the defendant] from civil liability because there [was] no pre-existing case which would have put him on notice . . . ." *Id.* In explaining the reason for her dissent, Judge Barkett observed that "a reasonable district attorney, or any other reasonable person, would have known that such outrageous conduct constituted sexual harassment." *Id.* at 1321. The majority disagreed. Relying on the Eleventh Circuit's expansive view of qualified immunity, it concluded that a reasonable person in the defendant's position would not have known that his behavior violated the plaintiff's constitutional rights, regardless of how outrageous that behavior may have been, "because the facts of this case are not sufficiently similar to any pre-existing case." *Id.* As Judge Barkett pointed out, by narrowing the inquiry to a search for similar facts rather than for a guiding legal principle, the Eleventh Circuit reached a result that is contrary to this Court's precedent, the analytic approach followed in every other circuit, and common sense. *Id.*[6]

[6] Less egregious facts have caused other circuits to deny qualified immunity in the context of sexual harassment. *See, e.g., Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 800 n.2 (6th Cir. 2000)("because the law regarding sexual harassment was established at the time Plaintiff brought her claim, Black was not entitled to the defense of qualified immunity"); *Johnson v. Martin*, 195 F.3d 1208, 1220 (10th Cir. 1999) ("[e]ven if the contours of a supervisor's responsibility are uncertain, complete inaction in the face of claimed harassment cannot be objectively reasonable conduct entitling a supervisor to qualified immunity"); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994)("A supervisor who has been apprised of unlawful harassment . . . should know that her failure to investigate and stop the harassment is itself unlawful"); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997)("Although the law construing the specific causes of action and remedies provided for by §§1983 and Title IX continues to evolve, it is evident that in 1994 Ms. Crawford had a clearly established right not to be discriminated against or harassed on the basis of her sex").

First Amendment rights have also suffered under the Eleventh Circuit's view of qualified immunity. For all intents and purposes, a public employee claiming workplace retaliation based on protected speech is barred from recovering damages in the Eleventh Circuit. *See Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994)("Because *Pickering* requires a balancing of competing interests on a case-by-case basis . . . only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights").[7] Likewise, police have been given a virtual blank check to suppress speech using disorderly conduct and breach of the peace statutes. For example, in *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), a local attorney in Miami drove into a bank's parking lot, observed an apparently nonhandicapped woman walk to her car parked in a handicapped space, shouted to a nearby police officer: "[A]ren't you supposed to give them a ticket for parking in a handicapped spot?," *id.* at 1444, and "Miami police don't do shit," *id.*, and was arrested for disorderly conduct. Although acknowledging that both federal courts and Florida's Supreme Court had on several occasions "reversed convictions for disorderly conduct where a defendant merely directed profane language at police officers," *see id.* at 1445, the Eleventh Circuit nonetheless ruled that the defendant police officers were entitled to qualified immunity. According to the Eleventh Circuit, "[t]he fact-intensive nature of the constitutional inquiry," coupled with a lack of "cases clearly establish[ing] that [the suspect's] actions did not constitute legally proscribed disorderly conduct," sufficiently blurred the First Amendment question to absolve the officers of liability. Prior rulings that the First Amendment protects angry and even profane language directed at police officers

[7] *Compare Myers v. Hasara*, 226 F.3d 821 (7th Cir. 2000)(refusing to award qualified immunity in case involving retaliation based on speech).

were not enough for the Eleventh Circuit.[8] Instead, it demanded a case with identical facts.

A similar fate has befallen the Fourth Amendment, which outside the excessive force context is now virtually unenforceable in the Eleventh Circuit. In *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001), petition for *cert.* filed (Nov. 9, 2001)(No. 01-979), for example, students at West Clayton Elementary School in Clayton County, Georgia were strip searched following a classmate's report that he had lost an envelope containing $26.00. *Id.* at 1163. The Eleventh Circuit had "little trouble concluding" that the mass strip searches were unconstitutional; it was "readily apparent that the strip searches were highly intrusive . . . [and] clearly represent[ed] a 'serious intrusion upon the student's personal rights.'" *Id.* at 1168-69. Still, because it found no pre-existing, "factually defined" case precisely on point, it awarded the officials qualified immunity.[9]

Space constraints prevent *amici* from detailing an exhaustive list of cases awarding qualified immunity in the Eleventh Circuit. Suffice it to say that the Eleventh Circuit has, post-*Lanier*, found qualified immunity in literally every constitutional context imaginable. In addition to those cases discussed above, the Eleventh Circuit has upheld a qualified immunity defense to defeat racial discrimination claims,[10]

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[8] *Contrast Lewis v. New Orleans*, 415 U.S. 130 (1974)(striking down New Orleans ordinance making it unlawful for any person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police"). Every other circuit to consider this issue since *Lewis* has found that arrests based on profanity violate clearly established First Amendment standards. *See, e.g., Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162 (5th Cir. 1997)(no qualified immunity for arresting a motorist who told an off-duty policeman at a gas station to "move his damn truck"); *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997)(verbal exchange at airport; demand for officer's name and badge number; refusal to exit immediately after being ordered to do so); *MacKinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995)(writing with washable chalk on public sidewalk; failure to immediately stop); *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994)(arrest of referee at hotly-contested high school basketball game); *Gainor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992)(arrest of person walking through downtown carrying a large cross and distributing leaflets); *Enlow v. Tishomingo County*, 962 F.2d 501, 509-10 (5th Cir. 1992)(on plaintiff's version, inquiry whether the sheriff had a search warrant or an arrest warrant; taking photographs of the officers); *Buffkins v. City of Omaha*, 922 F.2d 465 (8th Cir. 1990)(calling police officer an "asshole"); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990)(obscene gestures and yelling profanities); *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987) (telling officer "I want my damn dog" and "did you shoot my dog?"); *Vela v. White*, 703 F.2d 147 (5th Cir. 1983)(walking down the street; agitated questioning about arrest).

[9] Courts have ruled for well over a decade that strip searches in schools, absent particularized suspicion, violate the Fourth Amendment. *See Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980)(holding that strip search of 13-year-old student violates Constitution and "any known principles of human decency"); *Bell v. Marseilles Elementary Sch.*, 160 F.Supp.2d 833 (N.D. Ill. 2001)(qualified immunity denied for mass strip search of students for missing money because case law *"clear for sixteen years"*) (emphasis added); *Konop v. Northwestern Sch. Dist.*, 26 F.Supp.2d 1189, 1205 (D.S.D. 1998)(qualified immunity denied for strip search of eighth grade girls where school "possessed no specific information that any particular student had stolen the money [that had come up missing from the girls locker room]"); *Oliver v. McClung*, 919 F.Supp. 1206, 1218 (N.D. Ind. 1995)(qualified immunity denied because "argument that it is not unreasonable to conduct a strip search of [an entire seventh grade class of] young school girls in an effort to recover the grand sum of four dollars and fifty cents is simply not convincing"); *Burnham v. West*, 681 F.Supp. 1160, 1165 (E.D.Va. 1987)(mass student search "conducted in an atmosphere devoid of individualized suspicion" unconstitutional).

[10] *See, e.g., Mencer v. Hammonds*, 134 F.3d 1066, 1070-71(11th Cir. 1998)(holding in interlocutory appeal that plaintiff's claim of racial discrimination was defeated by qualified immunity); *see also Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997)(applying qualified immunity to defeat §§1981 and 1983 claims based on racial

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free speech claims,[11] charges of deadly force,[12] illegal searches[13] and unlawful arrests under the Fourth Amendment,[14] claims of abuse,[15] unsanitary prison conditions[16] and neglect[17] under the Eighth Amendment, and both procedural[18] and substantive[19] claims under the Fourteenth

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[10] (...continued)
discrimination). *See* Stephen B. Bright, "Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary," 14 Ga. St. L. Rev. 817, 841-42 (1998)("The [Eleventh Circuit] has also frequently found those accused of racial discrimination or other constitutional violations to be immune from suit").

[11] *See, e.g., Denno v. School Bd. of Volusia County*, 182 F.3d 780 (11th Cir. 1999)(officials immune for suspending student who brought Confederate flag to school).

[12] *See, e.g., Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001)(officer immune from liability for using deadly force and shooting into moving vehicle).

[13] *See, e.g., Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001)(officers immune for strip searching detainee arrested for drunk driving).

[14] *See, e.g., Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998) (officers immune for arresting traveling minister for disorderly conduct).

[15] *See, e.g., Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994)(officials immune in connection with sexual abuse of youthful detainee by center employees).

[16] *See, e.g., Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998)(prison officials immune for poor prison conditions).

[17] *See, e.g., Sanders v. Howze*, 177 F.3d 1245 (11th Cir. 1999)(failure to prevent suicide by prisoner).

[18] *See, e.g., Harbert Intern, Inc. v. James*, 157 F.3d 1271 (11th Cir. 1998)(finding immunity from liability for Procedural Due Process and Fifth Amendment Takings violations).

[19] *See, e.g., Santamorena v. Georgia Military College*, 147 F.3d 1337 (continued...)

Amendment's Due Process Clause. The Eleventh Circuit, in sum, continues to immunize virtually every constitutional wrong imaginable under its "fact-specific" test.[20]

Gold, *Lewis*, *Thomas* and the present case illustrate the reality of constitutional litigation in the Eleventh Circuit: government officials regularly receive immunity regardless of the gravity of their wrongs and irrespective of the clarity of the rights they violate. Government officials are not expected by the Eleventh Circuit to deduce, extrapolate, or analogize, nor are they expected to employ constitutional common sense. *See* Brown, "The Failure of Fault Under §1983," *supra* note 5, at 1511 n.52 (noting that "the problem of too much immunity" may be "peculiar to the Eleventh Circuit"). Because the Eleventh Circuit's "materially similar" test has devolved into almost-absolute immunity, it strays far from the "fair warning" norm established by this Court and recognized by virtually every other circuit.

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[19] (...continued)
(11th Cir. 1998)(officials immune from liability for rape of female student on college campus).

[20] Only in rare instances are officials denied immunity. *Amici* have uncovered only a handful of Eleventh Circuit cases post-*Lanier* that refused qualified immunity. Most of these, moreover, involved frequently litigated, crystal-clear constitutional rights, like the prohibitions on invidious race- and gender-based discrimination. *See, e.g., Lambert v. Fulton County*, 253 F.3d 588 (11th Cir. 2000)(racial discrimination); *Alexander v. Fulton County*, 207 F.3d 1303 (11th Cir. 2000)(racial discrimination); *Braddy v. Florida Department of Law Enforcement*, 133 F.3d 797 (11th Cir. 1998)(sexual harassment). As observed above, the Eleventh Circuit sometimes awards immunity even in these contexts. An *en banc* decision of the Eleventh Circuit also recently denied qualified immunity in the context of prisoners' safety. *See Marsh v. Butler County*, 268 F.3d 1014 (11th Cir. 2001).

C. The Eleventh Circuit Errs By Refusing To Look To Persuasive Precedent

The Court has made plain that its qualified immunity inquiry focuses on whether the plaintiff can identify "controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule on which [it] seek[s] to rely," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). The Eleventh Circuit, however, continues to ignore persuasive precedent. Instead, it holds that clearly established law can only be located in published decisions of this Court, the Eleventh Circuit, and the supreme court of the state where the action arose. *See Hamilton v. Cannon*, 80 F.3d 1525, 1531-32 n.7 (11th Cir. 1996); *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995)("The remaining cases on which plaintiffs rely do not come from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the Florida Supreme Court and, therefore, cannot show that plaintiffs' right to due process was clearly established"); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997)(*en banc*); *Marsh v. Butler County*, 268 F.3d at 1032 n.10 ("We do not understand *Wilson v. Layne*, 526 U.S. 603 (1999), to have held that a 'consensus of cases of persuasive authority' from other courts would be able to establish the law clearly"). The result is a vanishingly small vision of fair warning.[21]

[21] Compounding the Eleventh Circuit's cramped vision of relevant precedent is its refusal to recognize that Florida's district courts of appeal are empowered to render binding decisions on a state-wide basis, *see Pardo v. State*, 596 So.2d 665, 666-67 (Fla.1992)("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts"), as well as its refusal to consider decisions of its federal district courts.

Virtually every other circuit to address the matter has concluded that a consensus of persuasive cases defeats qualified immunity. *See, e.g., Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001)(citing *Wilson*, 526 U.S. at 617); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C.Cir. 2001)("the court must determine whether the Supreme Court, the District of Columbia Circuit, and, *to the extent that there is a consensus, other circuits have spoken clearly on the lawfulness of the conduct at issue*")(emphasis added); *Jacobs v. Chicago*, 215 F.3d 758, 767 (7th Cir. 2000) (same); *Doe v. Delio*, 257 F.3d 309, 332 (3d Cir. 2001) (Nygaard, J., concurring and dissenting)(I believe that *a 'consensus of cases of persuasive authority'* had been established by 1995")(citing *Wilson*, 526 U.S. at 617)(emphasis added). As with its demand for precise, factually indistinguishable precedent, the Eleventh Circuit stands alone when it insists on binding support. No other circuit takes such a limited approach to qualified immunity.[22]

II. The Right To Be Free From Prolonged Physical Restraint That Risks Serious Harm Was Clearly Established Long Ago

The Eighth Amendment prohibits "cruel methods of punishment that are not regularly or customarily employed." *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991). This prohibition encompasses both "unnecessary and wanton infliction of pain," *see Rhodes v. Chapman*, 452 U.S. 337, 346 (1980), and prison conditions that deny inmates the "mini-

[22] Several other circuits reached this conclusion before this Court's decision in *Wilson*. *See, e.g., Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988); *Vaughn v. Ruoff*, 253 F.3d 1124, 1130 (8th Cir. 2001); *Capoeman v. Reed*, 754 F.2d 1512, 1514-15 (9th Cir. 1985).

mal civilized measures of life's necessities." *Id.* at 347. Because the Eighth Amendment applies to prison authorities as well as legislative bodies and judges, "deprivations that were not specifically part of the sentence, but were suffered during imprisonment" are subject to its terms. *See Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Where "the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* at 300 (emphasis in original). Where punitive intent is clear, the question is an objective one: whether the punishment is compatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

Handcuffs, shackles and irons are not *per se* unconstitutional under the Eighth Amendment. *See Jackson v. Cain*, 864 F.2d 1235, 1243 (5th Cir. 1989)(holding that chains may be used under certain circumstances). Restraints are permissible, for example, when linked to a "legitimate penological interest," *Turner v. Safley*, 482 U.S. 78, 89-90 (1986), such as preventing escape when a prisoner is taken outside the prison, *see Fulford v. King*, 692 F.2d 11 (5th Cir. 1982)(holding that handcuffs may be used on prisoners outside the prison to prevent escape), preventing suicide or violence, *see Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir. 1995), or limiting inmate access to unauthorized areas within the prison. *Knox v. McGinnis*, 998 F.2d 1405, 1412 (7th Cir. 1993).

Prolonged physical restraint runs afoul of the Eighth Amendment in two instances: (1) "where movement is denied [,] . . . [and] the health of the individual is threatened," *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985), and (2) where the restraint "could [not] plausibly have been thought necessary" to achieve some legitimate penological interest, such as protecting the inmate, preventing escape, or

"restoring official control over a tumultuous cellblock." *See Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Youngberg v. Romeo*, 457 U.S. 307 (1981)(holding that freedom of bodily movement is a fundamental right); *Wells v. Franzen*, 777 F.2d 1258, 1262 (7th Cir. 1995)("Due process requires that the nature and duration of the physical restraint bear some reasonable relation to the purpose for which it is prescribed"). Prolonged physical restraint for punishment's own sake necessarily constitutes cruel and unusual punishment -- with or without serious physical injury.

The restraint employed in the present case seriously threatened the health of the inmate. As observed by the court below, Hope's restraint posed a substantial risk of harm that was disregarded by the staff. *Hope*, 240 F.3d at 978. Hope was handcuffed to the post "in the hot sun for seven hours with no shirt," little water and no restroom breaks. *See id.* at 978-79 (citing *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), and *Wilson v. Seiter*, 501 U.S. at 300). "At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet." 240 F.3d at 978. His restraint, moreover, was unrelated to any legitimate penological interest. In *Whitley*, 475 U.S. at 322, this Court warned that "actions taken in bad faith and for no legitimate purpose" by prison officials violate the Eighth Amendment. Shooting an inmate in order to punish him certainly violates this standard. *Id.* Likewise, because chaining an inmate to a post or stake for a prolonged period of time serves no legitimate nonpunitive purpose, it too runs afoul of the Eighth Amendment. As recognized below, punishment for punishment's sake is not a legitimate justification for abusive force and prolonged restraint. *Hope*, 240 F.3d at 979.

For more than a century, courts have routinely condemned physical restraints such as stocks, stakes and pillories. In *Weems v. United States*, 217 U.S. 349, 376-78

(1910), this Court expressed doubt over whether the pillory and whipping post were acceptable punishments: "it may be well doubted," the Court opined, that either proved consistent with a "progressive" and "enlightened" approach to criminal corrections. By 1981, it was clear that "the public pillory [had been] long abandoned as a barbaric perversion of decent justice."[23] *Chandler v. Florida*, 449 U.S. 560, 580-81 (1981). Indeed, as early as 1840 one constitutional commentator concluded that "[t]he prohibition of cruel and unusual punishments . . . would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion." J. Baynard, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840)(quoted in *Harmelin*, 501 U.S. at 981).

Because "[t]he pillory is almost identical to the stocks, which is identical to the restraining bar," *Austin v. Hopper*, 15 F.Supp.2d at 1259 (quoting transcript of hearing before magistrate judge), and since, "[i]f anything, the pillory, as it was designed, was probably more comfortable because in most cases the prisoner sat on the ground and had his feet and his hands put through a stock," *id.*, the hitching post's comparison to the pillory is inevitable. The Eleventh Circuit's predecessor, the Fifth Circuit, had little difficulty with this analogy in *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974), where it found that "handcuffing inmates to the fence and to cells for long periods of time . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise

[23] The Court cited *Hobbs v. State*, 32 N.E. 1019 (Ind. 1893), where the Indiana high court stated that punishments "such as that inflicted at the whipping post, in the pillory, burning at the stake, [and] breaking on the wheel" were certainly cruel and unusual. 217 U.S. at 376.

maintain awkward positions for prolonged periods" runs afoul of the Eighth Amendment. In 1994, the Department of Justice "advised the DOC that the use of the hitching post constituted improper corporal punishment and was not an acceptable use of restraints." *Hope*, 240 F.2d at 978-79. Judge Thompson in *Austin v. Hopper*, 15 F.Supp.2d at 1259, citing *Gates*, observed that "for over 20 years, institutional practices that impose pain on inmates in ways similar to the hitching post have been deemed to 'offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.'"

The fact that only Alabama authorizes physical restraint in this fashion, *Austin*, 15 F.Supp.2d at 1259, demonstrates that the practice is "not regularly or customarily employed." *Harmelin*, 501 U.S. at 976. Professional standards promulgated by the American Correctional Association (ACA) and the American Bar Association (ABA), moreover, absolutely prohibit the use of prolonged restraint as punishment. *See* AMERICAN CORRECTIONAL ASSOCIATION AND COMMISSION ON ACCREDITATIONS FOR CORRECTIONS STAFF, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 60 (3d ed. 1990) ("instruments of restraint, such as handcuffs, irons, and straight jackets, *are never applied as punishment* . . . .")(emphasis added);[24] IV AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 23-121 (2d ed. 1983)("Personal restraints like handcuffs, irons, and straitjackets are to be used only if necessary to prevent individual prisoners from

[24] According to the ACA, "instruments of restraint should be used only as a precaution against escape during transfer, for medical reasons, by direction of the medical officer, or to prevent self-injury to others, or property damage." STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, *supra*.

escaping during transfers or injuring themselves or others")(cited in *Austin*, 15 F.Supp.2d at 1259 nn.221 & 222). It was thus abundantly clear in 1995 that Alabama's use of hitching posts as corporal punishment was foreign to the American penological ideal. Indeed, Alabama's practice is aberrant even when judged by universal standards, such as those promulgated by the United Nations. *See* UNITED NATIONS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 6-7 (1984)("Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment")(cited in *Austin*, 15 F.Supp.2d at 1259 n.222). By 1995, no reasonable official could have understood constitutional precedent to tolerate summarily[25] chaining an inmate to a hitching post for hours on end. The practice was clearly unconstitutional.

[25] Although apparently not raised below, summary use of the hitching post likely violates procedural due process, since it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 486 (1995).

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit, awarding qualified immunity, should be reversed.

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No. 01-309

IN THE

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a/ KEITH GATES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF MISSOURI, NEBRASKA, NEVADA, OKLAHOMA, UTAH, INDIANA, WEST VIRGINIA, MISSISSIPPI, LOUISIANA, HAWAII, PENNSYLVANIA, OREGON, CONNECTICUT, RHODE ISLAND, IDAHO, AND THE TERRITORY OF GUAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The Court has posed the following questions:

1. Whether state officials sued in their individual capacities under 42 U.S.C. § 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts "materially similar" to those in the plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. § 1983.

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STATEMENT OF INTEREST

Amici Curiae are the States of Missouri, Nebraska, Nevada, Oklahoma, Utah, Indiana, West Virginia, Mississippi, Louisiana, Hawaii, Pennsylvania, Oregon, Connecticut, Rhode Island, Idaho and the Territory of Guam (collectively, *Amici* or "*Amici* States"). They have a strong interest in this case, not so much for what it may portend for the constitutionality of Alabama's policy of using restraining bars to induce prison inmates to behave properly on their work details (a matter on which *Amici* take no position), but for its potential impact on the law of qualified immunity.

Collectively, *Amici* States employ hundreds of thousands of individuals. Each of them faces the risk of a lawsuit under 42 U.S.C. § 1983 seeking to hold him or her personally liable for action or, in some circumstances, inaction. Yet the vast majority of *Amici*'s employees are not lawyers or judges. Indeed, the vast majority have little, if any, experience with the legal system, much less with the construction of judicial opinions.

Accordingly, the central question in this case—the amount of "breathing space" afforded to public employees in construing and applying judicial decisions for purposes of qualified immunity—is of paramount importance to *Amici*. The less breathing space this Court affords, the narrower will be the scope of that immunity and, accordingly, the greater the potential for state employees to incur litigation costs and potential judgments under Section 1983. Given that most States not only indemnify their employees against such judgments, but also assume the costs of their defense, the financial costs of such litigation fall directly upon the States.

But the consequences to *Amici* do not end there. Like *Bivens* actions against federal employees, Section 1983 lawsuits undoubtedly deter some unlawful behavior. Nonetheless, unless such suits are constrained by appropriate

qualified immunity protection, they will make it more difficult to recruit and retain high-quality employees. As this Court has long recognized, moreover, such suits can lead to a number of other ills, including "the diversion of official energy from pressing public issues" and "dampen[ing] the ardor of all but the most resolute, or the most irresponsible [government officials] in the unflinching discharge of their duties." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (internal quotation omitted).

Accordingly, if not tightly controlled, such lawsuits can hamper the effectiveness of State programs in a variety of contexts. These unintended consequences may be felt not only in prisons, where the potential plaintiffs "have demonstrated a proclivity for antisocial, criminal, and violent conduct," *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985), but also in law enforcement, health and safety regulation, environmental protection, recreational programs, child protection and family welfare.

For all these reasons, *Amici* have a powerful interest in ensuring that the qualified immunity defense to Section 1983 liability remains robust, and that applicable legal standards give public officials ample breathing space in their interpretations of judicial decisions.

STATEMENT OF FACTS

To avoid burdening the Court with another recitation of the facts, *Amici* adopt the statement in respondents' brief.

SUMMARY OF ARGUMENT

1. The central issue in this case is how public officials, state or federal, can determine whether a particular legal principle derived from case law is established with sufficient clarity and particularity that it can be the basis for liability under Section 1983 or *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Eleventh Circuit's approach—which asks whether the facts of the case

relied upon are "materially similar" to the facts of the case at issue—provides the appropriate standard.

Indeed, this standard mirrors the standard this Court already applies in determining, on federal habeas review, whether a state-court decision is "contrary to clearly established law." As the Court has explained in its habeas jurisprudence, a state judge interpreting case law acts "contrary to clearly established federal law" when he "'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Penry* v. *Johnson*, 532 U.S. 782, 792 (2001) ("*Penry II*") (quoting *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000)).

It would be inappropriate to hold public officials—especially lay state officials—to a higher level of interpretive accuracy in determining when federal law is "clearly established" than are state judges in the habeas context. First, in both cases, the policy rationale for giving officials ample breathing space is the same, namely, protecting the public. Second, although they face similar interpretive problems, state judges are, if anything, better equipped to reach the correct answer than are most lay employees. Judges have both the legal skills with which to discern the meaning of precedent and the advantage of setting the pace at which they make determinations, whereas most lay officials have little familiarity with legal principles and often are required to make snap judgments. Third, principles of comity and federalism also militate in favor of giving as much leeway to a state's lay officials in their efforts to discern the limits of federal law as the law affords to state judges on habeas review.

Like this Court's habeas jurisprudence, the Eleventh Circuit's "materially similar" approach also accords with this Court's qualified immunity precedent. As the Court recently reiterated, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be

clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001) (emphasis added). By itself, this statement suggests the need for a fairly tight similarity to the facts of the case relied upon as establishing the pertinent legal principle. But the Court did not stop there. It went on to say that the test is whether the case relied upon occurred "under facts not distinguishable in a fair way from the facts presented in the case at hand." *Id.* at 2157. To say that a case is "not distinguishable in a fair way" is to say, in essence, that the case is not "materially distinguishable," which in turn implies that the facts of the two cases are not "materially similar."

2. Even if the Court were to adopt a stricter standard of review in the qualified immunity context (which it should not), the decision below still should be affirmed. The contrary arguments advanced by petitioner and his *amici* for depriving the respondents of their qualified immunity ignore fundamental principles applicable in any lawsuit under Section 1983.

First, absent an allegation and proof of conspiracy (of which there is none here), state officials are amenable to suit and subject to liability under 42 U.S.C. § 1983 only for their own actions, and only on the basis of *reasonable* inferences from the summary judgment record. Here, the only challenged conduct fairly attributable to these prison guards, based on the summary judgment record, is that they either placed petitioner on the restraining bar or ordered him placed there. It is undisputed that they did so, moreover, pursuant to a state-wide prison regulation (Regulation 429) that requires other officers—those posted near the bar—to ensure that the inmate receives adequate food, water and bathroom breaks, and to given him an opportunity to return to work as soon as he indicates a willingness to do so.

Second, any determination of whether a particular case "clearly establishes" a constitutional right must take account of other pertinent authority, including regulations as well as

case law. *E.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Here, petitioner relies primarily upon a 1974 circuit court decision indicating it would be unlawful to punish prisoners by handcuffing them to fences or prison cells for extended periods. Yet prison regulations subsequently issued by Alabama's governor and its highest correctional official not only condoned but directed the use of a restraining bar to encourage prison inmates to return to work in a cooperative spirit. And no fewer than six federal-court decisions between 1974 and the events at issue here held that the use of the restraining bar, or similar restraint, in such circumstances does not violate the Eighth Amendment.

Given all of this intervening authority, it cannot reasonably be concluded that petitioner enjoyed a "clearly established" federal right to avoid being attached to the bar when he refused to work or was disruptive to his work crew. Under any standard, it is inappropriate to subject state officials to suit when their conduct was fully consistent with the current state of the law.

ARGUMENT

This case gives the Court an opportunity to provide much-needed guidance to the lower federal and state courts on an issue that has bedeviled public employees—and their employers—ever since they became subject to liability under 42 U.S.C. § 1983 and *Bivens*, 403 U.S. 388 (1971). That issue is how they can determine whether a particular legal principle, derived from case law, is established with sufficient clarity that it can be the basis for liability in a real-world situation.

As explained below in Section I, the Eleventh Circuit's standard of requiring "materially similar" case law guidance, at least when the underlying mandate is not itself crystal clear, is the appropriate standard. Moreover, as explained in Section II, the proper application of this standard requires

attention to settled principles of vicarious liability and established summary judgment standards, as well as a recognition of the important role that administrative regulations and competing case law can play in determining whether a particular right has been "clearly established."

I. UNLESS A CONSTITUTIONAL PROVISION OR STATUTE ON ITS FACE ESTABLISHES THE UNLAWFULNESS OF THE CONDUCT AT ISSUE, PUBLIC OFFICIALS CAN BE DEPRIVED OF THEIR QUALIFIED IMMUNITY ONLY IF THE UNLAWFULNESS OF THAT CONDUCT IS "CLEARLY ESTABLISHED" BY A CONTROLLING, MATERIALLY SIMILAR CASE.

As this Court established 20 years ago, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). It is, however, a fact of public life that large interpretive gaps often exist between general statements in the constitutional and statutory text and the way in which those statements will be held to apply in a given context. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (qualified immunity analysis turns "upon the level of generality at which the relevant 'legal rule' is to be identified"). Accordingly, when a constitutional or statutory provision provides no clear instruction, or when the application of a straightforward provision is elusive in a given context, case law is especially important to set the parameters of these federal protections and to guide the officers' actions. See U.S. Br. 16-17.

Given that reality, the key question—and the principal question presented here—is how to decide when case law establishes a constitutional right with sufficient clarity as to "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001), and thus to trigger personal liability. By what standard is this determination to be made?

This is not the first time this Court has addressed such an issue. In 1989, in the habeas corpus context, the Court held that a state-court decision could not be overturned on federal habeas review on the basis of a "new rule" of constitutional law. *Teague* v. *Lane*, 489 U.S. 288, 301 (1989). A few years later, Congress codified this principle in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which prohibits a federal court from granting a habeas petition on the basis of an alleged conflict with controlling case law unless the state court's decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Shortly thereafter, in *Williams* v. *Taylor* and unanimously in *Penry* v. *Johnson*, the Court held that the standard by which to determine whether a state-court decision is "'contrary to . . . clearly established Federal law'" is whether the state court "confronts facts that are *materially indistinguishable* from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams* v. *Taylor*, 529 U.S. 362, 404, 405 (2000) (omission in original) (emphasis added); *Penry* v. *Johnson*, 532 U.S. 782, 792 (2001) ("*Penry II*") (same).

Setting aside the fact that only a decision of this Court can have controlling effect in the habeas context,[1] the *Williams/Penry II* analysis provides an appropriate standard with which to answer the question presented in this case. That is, just as a state-court decision cannot be overturned on

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[1] The federal habeas statute expressly limits the range of "clearly established" law to that of this Court. 28 U.S.C. § 2254(d)(1); *Penry II*, 532 U.S. at 792; *Williams* v. *Taylor*, 529 U.S. 362, 405-06 (2000). By contrast, the Court has indicated that lay officers can be required to look beyond this Court's cases to "any cases of controlling authority" in the officer's jurisdiction, which "clearly established the rule on which [plaintiff] seek[s] to rely." *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999); *see also United States* v. *Lanier*, 520 U.S. 259, 268-69 (1997).

federal habeas review unless it decides a case differently than this Court has on a set of materially indistinguishable facts, so also a public official should be deprived of qualified immunity on the basis of case law only if his or her decision runs counter to a controlling case decided on materially indistinguishable facts.

As shown below, that is the essence of the Eleventh Circuit's approach. And it makes sense because it ensures that lay public officials—and especially state officials—will have as much "breathing space" in their interpretations of controlling case law as state judges receive in the habeas context. Moreover, unlike the approaches advocated by petitioner and his *amici* the ACLU, the Eleventh Circuit's approach is fully consistent with this Court's qualified immunity jurisprudence.

A. Public Employees Should Enjoy At Least As Much "Breathing Space" In Their Application Of Case Law As State-Court Judges Receive In Applying Case Law In Criminal Proceedings That Are Reviewed In Federal Habeas Actions.

It seems intuitively obvious that a public official with no legal training should receive at least as much leeway in her interpretation of case law as a state-court judge whose decision is being reviewed in a federal habeas proceeding. Not only is a judge better equipped to make such judgments, but the policy rationale for affording breathing space to decisions of state judges in criminal trials—protecting the public safety—applies with equal force to the decisions of most public officials. Moreover, when the decision at issue is that of a state official, the same concerns about federalism and comity apply in both contexts.

1. Lay public officials and state-court judges are similar in two respects that are relevant here. First, the policy rationale for allowing their decisions a measure of breathing space is essentially the same. In both cases, to be sure, there is a need

to protect against "the plainly incompetent [and] those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity); *Calderon* v. *Coleman*, 525 U.S. 141, 146 (1998) (habeas "protects the State's sovereign interest in punishing offenders and its good-faith attempts to honor constitutional rights, while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged") (internal quotations omitted). However, in both cases, "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974) (qualified immunity), *limited on other grounds*, *Harlow*, 457 U.S. at 818; *accord (Michael) Williams* v. *Taylor*, 529 U.S. 420, 436 (2000) (observing the need to "safeguard the States' interest in the integrity of their criminal and collateral proceedings" and in "finality") (habeas).

And in both cases, the law assumes that, although these officials "may err[,] . . . . it is better to risk some error and possible injury from such error" than to allow their decisions to be routinely second-guessed. *Scheuer*, 416 U.S. at 242 (qualified immunity); *accord Williams*, 529 U.S. at 406 (noting that habeas review should not reach "run-of-the-mill state-court decision[s] applying the correct legal rule from our cases"). Thus, in both cases, the law seeks to provide a measure of deterrence against patent violations, while avoiding the kind of over-deterrence that would hamper effective decision-making by competent officers acting in a reasonable manner.

Second, public officials and state-court judges share a common challenge in determining the scope of federal rights in particular "situation[s]." *Saucier*, 121 S. Ct. at 2156. Some constitutional or statutory provisions may seem clear on their face, but raise thorny issues in some applications. For example, the Thirteenth Amendment's prohibition on "involuntary servitude" seems facially clear and may be easy to apply in most circumstances, such as the unlikely scenario

in which a social welfare worker wonders if he can sell the children in his charge into slavery. See *United States* v. *Lanier*, 520 U.S. 259, 271 (1997) ("The easiest cases don't even arise.") (internal quotation omitted). But it may be less than obvious whether that Amendment prohibits a police officer from ordering a minor in his custody (and who has not been convicted) to wash police vehicles without pay. See *Buchanan* v. *City of Bolivar*, 99 F.3d 1352, 1358 (6th Cir. 1996) (upholding qualified immunity in such a circumstance).

Other constitutional and statutory provisions state broad guarantees—*e.g.*, the First Amendment's "freedom of speech," the Fifth and Fourteenth Amendments' "due process of law," the Ninth Amendment's protection for unenumerated "other" rights—that necessarily require case-by-case judicial interpretation. *Lanier*, 520 U.S. at 265 (observing that many constitutional and statutory protections "are, of course, themselves stated with some catholicity of phrasing"). The same is true of the Fourth Amendment's prohibition on "unreasonable" searches and seizures, the Sixth Amendment's "right to a speedy and public trial," and the Eighth Amendment's prohibition on requiring "excessive" bail or fines, or (as here) on inflicting "cruel and unusual" punishments.

These sorts of constitutional and statutory mandates do not, at least on their face, "delineate the range of forbidden conduct with particularity." *Id.* The precise limitations imposed by such provisions are thus difficult to discern because their application often requires legal judgments wedded to particular factual comparisons and contexts.

2. Although they face a common interpretive problem, lay officials and state judges are not equally well suited to the task. Lay officials typically have no formal legal training and are unfamiliar with the rigors of case analysis. Accordingly, they cannot fairly be "'expected to predict the future course of constitutional law.'" *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (quoting *Procunier* v. *Navarette*, 434 U.S. 555, 562

(1978)). Judges, by contrast, are well equipped to amass and analyze the pertinent universe of precedent and to discern whether and how the principles articulated there apply to the case at hand. Judges may rule incorrectly, but at least they have a fair chance of "predicting" how a reviewing court will rule.

Judges also typically have the advantage of determining the speed at which they analyze a matter and reach a decision. Most other public officials, by contrast, must make snap judgments in the shifting conditions of the field. See, *e.g.*, *Saucier*, 121 S. Ct. at 2158 ("'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving'") (quoting *Graham* v. *Connor*, 490 U.S. 386, 397 (1989)); *Scheuer*, 416 U.S. at 246 (prison officials "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication" of responsibility); *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985) ("[t]he administration of a prison is a difficult undertaking at best"). Without proper immunity for reasonable *mis*interpretation, government actors would be in the untenable position of facing the burdens of litigation and the risk of liability for guessing incorrectly the proper construction of an abstract constitutional provision.

Given that lay and judicial officials face similar interpretive challenges and that the former are less well equipped to discern the right answer, it makes sense to grant lay officials at least as much leeway in construing case law as is given to state judges in the habeas context.

3. When the public official is also a state employee, another consideration comes into play. As this Court has noted in the habeas context, AEDPA, like such decisions as *Teague*, on which it was based, was "intended . . . to advance" principles of "comity . . . and federalism." *(Michael) Williams*, 529 U.S. at 436. Overturning a state criminal conviction on federal habeas review raises obvious issues of respect for the States as sovereigns in the federal

system. See *Duckworth* v. *Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring) (habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority"). Imposing personal liability on a state official raises similar issues. See, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 & n.5 (1993) (likening qualified immunity for individual state officers to the benefits afforded by the Eleventh Amendment to States).

For all these reasons, especially when the suit is against a state official, the standards applied in the qualified immunity context to determine when federal law is "clearly established" should give at least as much breathing space to public officials as state judges receive in the habeas context.

B. The Eleventh Circuit's Approach Is Consistent With This Principle, Is Otherwise Faithful To This Court's Qualified Immunity Decisions, And Provides A Workable, Flexible Standard.

The Eleventh Circuit's standard satisfies this principle because it is functionally identical to this Court's *Williams/Penry II* standard for determining when a state-court decision violates "clearly established" law in the habeas context. And, as the United States also recognizes, the Eleventh Circuit's standard is fully consistent with this Court's qualified-immunity decisions. See U.S. Br. 18.

1. As noted in *Williams*, "[t]he antiretroactivity rule recognized in *Teague*, which prohibits reliance on 'new rules,' is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law.'" 529 U.S. at 379 (Stevens, J., concurring). That opinion also noted that the *Teague* rule was the "conceptual twin" of the "clearly established law" inquiry in the qualified immunity context. *Id.* at 380 n.12. From these two propositions it follows that AEDPA's "clearly established law" provision, which codified *Teague*, is functionally equivalent to the

"clearly established law" requirement of the qualified immunity defense. Accordingly, it makes sense to look to this Court's interpretations of the former in giving content to the latter.[2]

As indicated above, under AEDPA a judge acts "'contrary to'" clearly established law when he "'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Penry II*, 532 U.S. at 792 (quoting *Williams*, 529 U.S. at 406). The concepts of "contrary to" and "materially indistinguishable," moreover, play key roles in both the AEDPA analysis and the qualified immunity inquiry.

As this Court has explained, "contrary to" as used in AEDPA is commonly understood to mean "'diametrically different,'" "'opposite in character or nature,'" or "'mutually opposed.'" *Williams*, 529 U.S. at 405 (quoting *Webster's Third New International Dictionary* 495 (1976)). This same concept is embodied in the Court's qualified immunity jurisprudence, which grants immunity where an officer did not "*violate*"—*i.e.*, act contrary to—"clearly established statutory or constitutional rights." *Harlow*, 457 U.S. at 818 (emphasis added); see also *Anderson*, 483 U.S. at 650 n.2 (Stevens, J., dissenting) (qualified immunity not applicable to conduct an officer "should have known was *contrary to* a constitutional norm") (emphasis added).

The formulation of "materially indistinguishable" is likewise common to both contexts. As the Court recently explained, officers are entitled to qualified immunity unless courts have determined that the "conduct" at issue "is a

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[2] Although Justice Stevens' opinion in *Williams* cautioned that AEDPA did not necessarily codify qualified immunity standards in the habeas statute, *see* 529 U.S. at 380 n.12, that conclusion casts no doubt on the utility of looking to this Court's interpretation of AEDPA's "clearly established" requirement for guidance in interpreting that standard's "conceptual twin" in the qualified immunity context. *Id.*

constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 121 S. Ct. at 2157. But to say that the facts of one case are "not distinguishable in a fair way" from the facts of another case is to say that the two cases are "materially indistinguishable." Thus, the standard already adopted by the Court in the qualified immunity context is linguistically and logically equivalent to this Court's understanding of the standard under AEDPA.

Accordingly, to determine whether a given precedent is "materially" distinguishable from the circumstances presented (either to the state court in the habeas context or to the government officer in the qualified immunity context), the proper question is whether the facts and procedural circumstances "on the basis of which the precedent was decided," *Green* v. *French*, 143 F.3d 865, 870 (4th Cir. 1998), are present in the subsequent circumstance. If something the precedent-setting court found important to its holding is missing in the present scenario, that case is incapable of making it "clear to a reasonable officer that his conduct [is] unlawful in the situation he confront[s]." *Saucier*, 121 S. Ct. at 2156.

But that is the essence of the Eleventh Circuit's "materially similar" approach. Except in the unusual circumstance that the application of federal law to a given circumstance is "obvious," the Eleventh Circuit asks whether any authoritative case has applied the legal principle in question to "materially similar" facts. Pet. App. 13 (internal quotation omitted). By definition, this standard does not require *all* of the facts in the precedent to be identical to those in the instant case. To the contrary, only those facts "material" to the alleged precedent need be the same.

If one or more of those facts is different, however, it is fair to say that the "material dissimilarities" between the two cases make the cases "distinguishable" from each other. Conversely, a case that is "materially similar" to another case

is also "materially indistinguishable" from that case. Thus, the Eleventh Circuit's standard is in reality the same standard that this Court applies in the habeas context.[3]

2. Like the *Williams/Penry II* rule in the habeas context, the Eleventh Circuit's standard represents a sensible and workable approach to qualified immunity issues. See generally Resp. Br. 32-39. This is so for several reasons.

First, it gives the public official fair warning of his or her legal responsibility. The requirement of "similarity" to past cases encourages the official to pay attention to the case law, either directly or through a legal officer. And, as respondents point out, the "requirement of 'materiality' fine-tunes the necessary element of similarity to ensure that the warning is 'fair' without requiring the sort of precise factual identity that would render Section 1983 meaningless." *Id.* at 33-34. It thus "answers the question 'how much similarity is required' from the perspective of the public official, pegging the degree of similarity required to the ability of the 'reasonable official' to detect that similarity in the immediate circumstances with which he or she is presented." *Id.* at 34.

Second, like the *Williams/Penry II* standard, the Eleventh Circuit's standard provides enough deterrence to prevent egregious violations. And it does so without imperiling public officials' ability and incentive to "act swiftly and firmly" when necessary. *Scheuer*, 416 U.S. at 246.

Penry II is instructive on this point. There, the Court rejected a defendant's contention that the Court's closest-fitting Fifth Amendment self-incrimination case, *Estelle* v. *Smith*, 451 U.S. 454 (1981), was materially indistinguishable

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[3] If anything, moreover, the slight difference in terminology makes sense considering the primary audience to which each standard is addressed. While judges may be more accustomed to "distinguishing" case law, it may be more meaningful to ask laymen to think in terms of "material similarities."

from his case. 532 U.S. at 794. Although *Estelle* and petitioner's case shared certain similarities—both involved the question of whether the accused should have been warned of his Fifth Amendment privilege against self-incrimination in the context of a psychiatric examination that was later admitted at trial—the Court held, based on "several" "substantial" factual and procedural differences, that the state court's decision was not "contrary to" *Estelle*. Thus, by applying the "materially indistinguishable" standard, the Court was able to avoid over-deterrence in the use of psychiatric examinations. At the same time, by overturning another ruling in the same case (on a jury instruction question), the majority made clear that this standard is by no means toothless. See *id.* at 803-04.

Third, because of the linguistic similarity to the *Williams/Penry II* standard, adoption of the Eleventh Circuit's standard (whether phrased in terms of "materially similar" or "materially indistinguishable") would allow courts to look to the habeas context for guidance in determining whether a particular right or principle is "clearly established" in the case law. This would further facilitate the education of public officials as well as the courts that must review their actions.

C. The Approaches Advanced By Petitioner And His *Amici* Would Give Prison Guards And Other State Employees Far Less "Breathing Space" Than State Judges Receive On Federal Habeas Review, And Would Violate This Court's Qualified Immunity Decisions.

By contrast, the approach advocated by petitioner and the ACLU—holding state officials responsible for amorphous "universal, unchallenged norms or understandings," ACLU Br. 6—would contravene the settled rule that federal law must make it "clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier*, 121 S. Ct. at 2156 (emphasis added). Such an approach also would create the anomalous result that ordinary state employees,

such as the defendant corrections officers in this case, would be expected to be more adept at construing federal legal precedents than are state court judges.

Petitioner repeatedly invokes "fair warning" as the appropriate standard for determining whether a prison official should be entitled to qualified immunity. The problem with that approach is not the words themselves, taken, as they are, from this Court's opinion in *Lanier*, but the way in which petitioner suggests they should be applied. In effect, petitioner attempts to move the focus away from a careful analysis of pre-existing law "in the situation [the officer] confronted," *Saucier*, 121 S. Ct. at 2156, and towards a more abstract, subjective, and malleable post-*hoc* evaluation of "fairness." Under this conception, petitioner focuses on whether state officials have properly "exercis[ed] judgment" or accurately "appl[ied] familiar legal principles to new situations." Pet. Br. 15. Indeed, the ACLU suggests that state officials should be subject to personal liability unless they correctly "deduce, extrapolate, . . . analogize . . . [and] employ constitutional common sense." ACLU Br. 17.

These kinds of subjective, abstract evaluations foster the very uncertainty that this Court's precedents are designed to reduce. State officials should not be charged with knowledge of constitutional principles unless they are either facially obvious or have been considered and applied in a meaningful—and materially similar—context. To hold state officials open to suit and personal liability based on law that is less clear than this would be anything but "fair."

Although petitioner and the ACLU purport to rely on decisions of this Court, their approaches are inconsistent with this Court's qualified immunity decisions. For example, in *Anderson*, as shown above, this Court held that the existence of generalized legal principles did not suffice to strip an officer of qualified immunity. 483 U.S. at 639. For personal liability to attach, the law requires a "more particularized" showing: namely, that "unlawfulness" under the Constitution

be "apparent" based on preexisting law. *Id.* at 640; *accord Saucier*, 121 S. Ct. at 2156. Thus, there is much more to the "fair[ness]" component of "fair notice" than the briefs of petitioner and the ACLU would suggest. The Eleventh Circuit's standard provides precisely the amount of "fair notice" that this Court's decisions require.

II. VIEWED IN LIGHT OF SETTLED SUMMARY JUDGMENT PRINCIPLES AS WELL AS ALL CONTROLLING LEGAL AUTHORITY, RESPONDENTS' ACTIONS DID NOT VIOLATE "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHTS.

Once the legal standard for establishing a "clearly established" right is determined, the next question is whether the allegations that must be taken as true at the summary judgment stage constitute a deprivation of any "clearly established" right. Petitioner and his *amici* attempt to strip the respondents of qualified immunity not only because they attached him to the prison restraining bar, but on the basis of other collateral events. And they argue that the unlawfulness of these actions was "clearly established," largely on the basis of a single, 1974 decision of the Fifth Circuit, *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974).

But their arguments ignore settled legal principles that apply to all claims of qualified immunity, and which are dispositive here regardless of the precise standard for determining when case law "clearly establishes" a constitutional right. First, like any other public official, the three guards who are respondents here can be held liable only for their *own* actions, as established by reasonable inferences from the record evidence. See Fed. R. Civ. P. 56(e). As shown below, the only challenged conduct fairly attributable to these guards, based on the summary judgment record, is that they either placed petitioner on the restraining bar or ordered him placed there. Second, like any other public official, respondents were entitled to consider subsequent legal developments—including prison regulations and

subsequently decided cases—in determining whether the 1974 decision on which petitioner relies "clearly established" the unlawfulness of their actions.

A. A Public Official Can Be Denied Qualified Immunity Only On The Basis Of His Own Actions, As Established By Reasonable Inferences From The Evidence.

In analyzing the summary judgment record in this case, petitioner and his *amici* make two fundamental errors. They incorrectly assume that actions taken by other prison guards can be attributed to the respondents. And they incorrectly assume that petitioner is entitled to the benefit of all conceivable inferences, regardless of whether those inferences are reasonable. Once those misperceptions are cleared away, it is apparent that these respondents can be held liable, if at all, only for the bare act of handcuffing petitioner to the restraining bar.

1. This Court's precedents make clear that no state official can be held liable for the actions of another state official under Section 1983 absent evidence of a conspiracy. A party may be liable under Section 1983 only if he, under color of state law, "subjects, or causes to be subjected" any citizen to a deprivation of federal rights. 42 U.S.C. § 1983. In the municipal liability context, the Court repeatedly has held that Section 1983's causation requirement precludes vicarious liability.[4] Indeed, "[g]iven the importance, under § 1983, of

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[4] *See Board of County Comm'rs* v. *Brown*, 520 U.S. 397, 403 (1997); *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989) ("*Respondeat superior* or vicarious liability will not attach under § 1983.") (citing *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978)); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 122 (1988) ("vicarious liability [for policymakers] would be incompatible with the causation requirement set out on the face of § 1983") (citing *Monell*, 436 U.S. at 691); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 479 (1986) ("§ 1983 could not be interpreted to incorporate doctrines of vicarious liability") (citing *Monell*, 436 U.S. at 692-94).

distinguishing between direct and vicarious liability, the Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation." *City of Springfield* v. *Kibbe*, 480 U.S. 257, 267 (1987) (per curiam).

Vicarious liability is equally unavailable in suits against individual employees. In this context as well, "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of *his* actions.'" *Malley* v. *Briggs*, 475 U.S. 335, 345 n.7 (1986) (quoting *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961)) (emphasis added).

These principles are well illustrated in Justice Ginsburg's concurrence in *Saucier* v. *Katz*. 121 S. Ct. 2151, 2161 (2001). In that case, there was some question as to whether the plaintiff had been shoved by one officer, named Parker, or by Parker as well as Saucier. Justice Ginsburg's analysis, not disputed by the majority opinion, made clear that Saucier could not be held vicariously liable for anything Parker had done. She found it dispositive that, "at no point did [plaintiff] say, specifically, that Saucier himself, and not only Parker, pushed or shoved." *Id.* at 2161.

2. As Justice Ginsburg's concurrence in *Saucier* also makes clear, ordinary summary judgment principles apply with as much force in the qualified immunity context as in any other civil case. See *id.* & n.2. In analyzing any summary judgment record, the non-moving party is not entitled to every conceivable favorable inference from the record. Rather, the non-moving party is entitled only to the benefit of *reasonable* inferences. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986); see also *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999) ("'all *justifiable* inferences are to be drawn in [the nonmovant's] favor'") (emphasis added) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Accordingly, "speculative inferences from unrelated evidence" cannot

serve as the basis for denying summary judgment. *Hanrahan* v. *Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., dissenting) (observing that "[t]he prospect of defending such lawsuits can hardly fail to dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties") (internal quotation omitted), *quoted with approval in Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982).

The federal rules, moreover, require that, "[w]hen a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth *specific facts* showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). This requirement further constrains the range of inferences that can be drawn to defeat a summary judgment motion.

3. As set out more fully in the respondents' brief, petitioner cites two incidents as a potential basis for liability in this case. In one incident, which occurred on May 11, 1995, petitioner was handcuffed to a restraining bar for fighting with and threatening another inmate. On June 7, 1995, petitioner again was placed on the restraining bar for disrupting the work crew. Resp. Br. 3-9. Interpreted in the light most favorable to petitioner, but including only reasonable inferences, the record shows that the following actions are the only ones that can be attributed to each individual defendant:

Officer McClaran: Petitioner alleges that on May 11, Officer McClaran broke up a verbal disagreement and ordered petitioner put on the restraining bar for being "'disruptive to the work squad.'" JA 9 & 44. McClaran's own affidavit states that he "place[d] Inmate Hope on the Restraining Bar," although his affidavit does not specify the date. *Id.* at 24. There is no other evidence specifically linking McClaran to any of the events on June 7.

Sergeant Pelzer: Petitioner claims that Sergeant Pelzer actually placed him on the restraining bar on May 11. See *id.*

at 45. On June 7, Sergeant Pelzer is alleged only to have "place[d] leg irons on Inmate Hope and escort[ed] him to the security vehicle for transport to Limestone Correctional Facility." *Id.* at 23. There are no allegations, let alone evidence in the record, otherwise linking Sergeant Pelzer to the June 7 incidents.

Lieutenant Gates: Petitioner alleges that on June 7, Lieutenant Jim Gates cuffed petitioner to the restraining bar. See *id.* at 46. No evidence specifically links him to any other conduct on June 7.

Based upon the record, it is not reasonable to infer, and indeed it is implausible to suggest, that any of the respondents was involved on June 7 after petitioner was placed on the restraining bar. The record, in fact, clearly suggests that officers *other* than the named respondents were responsible for any conduct subsequent to petitioner's placement on the bar. When identifying these three respondents, petitioner is clear as to which actions are attributable to them.[5] In contrast, when making additional allegations of more egregious conduct, petitioner phrases his allegations in more general terms: he "was deprived of water and was teased by *two officers*"; "*they* started to bring me water but ended up giving my water to some dogs"; he "was teased by *officers*"; "*[t]he guards*" made him take off his shirt and left him in the sun for seven hours; and "*a guard*" taunted him about his thirst. JA 10-11 & 47 (emphasis added). Because petitioner's own affidavits attribute certain specific acts but not others to these three respondents, and the record shows that *other* officers were involved in much of the other conduct, it is only

[5] *See* JA 9 ("Officer McClaran . . . . ordered me put on the hitching post for being 'disruptive to the work squad.'"); *id.* at 44 ("Defendant Gene McClaran . . . ordered that I be placed on the hitching post because he claimed that I was being 'disruptive to the work squad'"); *id.* at 45 ("the officer who actually put me on the hitching post was Defendant Sergeant Mark Pelzer"); *id.* at 46 ("The officer who actually cuffed me to the hitching post on June 7 was Defendant Gates.").

reasonable to assume that, when the affidavit speaks of "guards" or "officials" in general terms, it refers to people other than the named petitioners here.

Accordingly, under settled summary judgment standards, the record does not afford any reasonable inference that any respondent denied water to the plaintiff, prevented him from using the bathroom, took his shirt away, or left him on the restraining bar after a request to return to work. The inferences that the Eleventh Circuit, petitioner and his *amici* draw on these matters are simply unreasonable to the extent they attempt to attribute specific actions—other than attaching petitioner to the bar in compliance with Regulation 429—to these three defendants. See U.S. Br. 21 & 24; Pet. Br. 4-5; ACLU Br. 1-2; Pet. App. 2-3, 6.[6]

B. Any Determination Of Whether A Particular Case "Clearly Establishes" A Constitutional Right Must Take Account Of Other Pertinent Authority, Including Both Regulations And Case Law.

Relying principally on the Fifth Circuit's 1974 decision in *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974), petitioner and his *amici* argue that, in 1995, petitioner had a "clearly established" constitutional right not to be attached to a

[6] The Court is of course not bound by the Eleventh Circuit's analysis of the record. First, a lower federal court's analysis of a summary judgment record is always subject to *de novo* review on appeal. *E.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 860 (1996) (plurality); *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992). Second and more generally, this Court can uphold the lower court's judgment on any ground supported by the record. *E.g.*, *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted."); *Langnes* v. *Green*, 282 U.S. 531, 536-37 (1931) ("the entire record is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the [district] court").

restraining bar (or any other fixed device), even as a means of inducing him to return to work in a cooperative spirit. These arguments, however, are based on two incorrect legal premises. First, they assume that a facially valid regulation—in this case Alabama's Regulation 429—is entitled to no weight in determining whether the law was "clearly established" in 1995. Second, these arguments ignore the fact that what is "clearly established" by the case law can (and often does) change over time. Once these erroneous assumptions are swept away, it is apparent that, even if *Gates* could be read to "clearly establish" a general right not to be attached to a restraining bar (and it cannot be read so broadly), no such right was "clearly established" at the time of the events at issue here.

1. As this Court recently held, the existence of a binding, state-wide policy is "important" in determining whether a practice sanctioned by that regulation violates "clearly established" constitutional rights. *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (officer's reliance on Marshals Service policy that "explicitly contemplated" the challenged conduct was "important to our conclusion" that qualified immunity was warranted). That is because public officials such as those in this case cannot be expected to be "seers in the crystal ball of constitutional doctrine." *Westberry* v. *Fisher*, 309 F. Supp. 12, 17 (D. Me. 1970). Moreover, such officers operate in a dangerous environment and must enforce a wide range of prison policies and regulations designed to protect them as well as inmates and prison staff.

Similar considerations explain why police officers are afforded greater latitude when they are acting in accordance with a statute or regulation, even if the law or regulation they enforce is later determined to be unconstitutional. As this Court held in *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967), a police officer will be "excus[ed] . . . from liability for acting under a statute that he reasonably believe[s] to be valid but that [is] later held unconstitutional." Indeed, *Pierson* and

cases following it create a presumption that an official acting in accordance with a law or regulation will be excused from personal liability for that action.[7] Although this protection is not absolute, personal liability is possible only when officials enforce a law or regulation that is "patently violative of fundamental constitutional principles." *Grossman* v. *City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994).

Such a presumption makes sense in this context as well. Prison guards and other state officials cannot be expected to stop and evaluate each policy they are called to enforce in light of current case law. *Accord Ort* v. *White*, 813 F.2d 318, 322 (11th Cir. 1987) ("Faced with . . . sudden wrongful and quite possible harmful conduct, the prison official on the scene does not have the luxury of hindsight and reflection."). And imposing such a requirement would put corrections officers in an impossible bind: they risk the safety of inmates and staff and perhaps their jobs if they fail to enforce prison regulations, but they risk personal liability if they fail correctly to divine the constitutional validity of the countless regulations they must enforce each day. See *Pierson*, 386 U.S. at 555 (policeman should not be forced to "choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does").

Neither petitioner nor his *amici* address this fundamental point. Yet any fair evaluation of what should have been "clearly established . . . [to] a reasonable person" standing in

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[7] *See, e.g., Dittman* v. *California*, 191 F.3d 1020, 1027 (9th Cir. 1999) ("when a public official acts in reliance on a duly enacted statute or ordinance, that official ordinarily is entitled to immunity"), *cert. denied*, 530 U.S. 1261 (2000); *Ireland* v. *Tunis*, 113 F.3d 1435, 1448 n.11 (6th Cir. 1997) (observing that a defendant "would be entitled to rely on longstanding practice . . . to establish the reasonableness of seeking a warrant"); *Shaw* v. *Stroud*, 13 F.3d 791, 801 (4th Cir. 1994) ("We have held that officers are entitled to qualified immunity when they rely on standard operating procedures.").

the defendants' shoes, *Harlow*, 457 U.S. at 818, must take into account that the officers were merely enforcing a presumptively valid regulation. Indeed, Regulation 429 states that an inmate who refuses to work or otherwise disrupts a prison work squad "*will* be handcuffed to the restraining bar." JA 103 (emphasis added). The officers were entitled to rely on this regulation's presumptive validity in carrying out their responsibilities.

2. Even if respondents were not entitled to rely on Regulation 429's presumptive validity, the totality of the binding authority in 1995 would not indicate to a reasonable officer that cuffing a prisoner to a restraining bar for a limited time, under a regulation that also provides for water, food, bathroom breaks, and release whenever the prisoner agrees to return peacefully to work, violated clearly established federal law.

Although Petitioner and his *amici* make much of the Fifth Circuit's 1974 *Gates* decision, *Gates* is not nearly as clear as petitioner makes it seem.[8] Moreover, as *Wilson* makes clear, whether official action is entitled to immunity depends on "the legal rules that were clearly established *at the time it is was taken*." 526 U.S. at 614 (internal quotation omitted) (emphasis added). Thus, even if the mere act of attaching a

[8] To be sure, *Gates* included "handcuffing inmates to the fence and to cells for long periods of time" in a laundry list of "innumerable instances of physical brutality and abuse." 501 F.2d at 1306. However, when read in context, the decision cannot reasonably be said to establish a bright line rule sufficient to put public officials on notice that the Eighth Amendment proscribes the use of restraining bars or similar devices, especially when used to induce an inmate to return to work in a more cooperative spirit. As the federal district court put it in *Fountain* v. *Talley*, "[t]here is no blanket prohibition against the use of punishment such as the hitching post in *Gates* which would signal to the Commissioner of Corrections [let alone ordinary corrections officers] that the mere use of the hitching post would be a constitutional violation." 104 F. Supp. 2d 1345, 1354 (M.D. Ala. 2000), *aff'd*, 275 F.3d 57 (11th Cir. 2001) (unpublished table decision).

prisoner to a restraining bar could be seen as violating "clearly established law" in 1974, respondents are nonetheless entitled to qualified immunity because the case law on this point was, at a minimum, ambiguous by 1995, when the relevant acts occurred.

For example, the Eleventh Circuit's decision in *Ort*, 813 F.2d 318, which the United States contends "provided respondents [with] additional notice," U.S. Br. 22, actually supports the constitutionality of respondents' actions and the prison regulation under which they acted. *Ort* specifically endorsed "immediate coercive measures undertaken by a prison official, necessitated by a spontaneous violation of a prison rule or regulation." 813 F.2d at 322. More specifically, the court observed that "prison officers must . . . have the authority to use that amount of force *or those coercive measures* reasonably necessary to enforce an inmate's compliance with valid prison rules." *Id.* at 325 (emphasis added).

Moreover, the conduct at issue in *Ort*, which the court held permissible, was to deny an inmate water until he complied with the rules and did the work required of him. *Id.* Thus, even if *Gates* stood for the general rule that petitioner claims it does, *Ort* indicated an exception to that general rule, namely, that coercive measures can be used to induce inmates to conform with prison rules, as long as the prisoner is given the option of escaping the punishment as soon as he is willing to comply. That is exactly what Regulation 429 does.

Finally, in the years preceding the 1995 incident, at least six federal courts in Alabama considered whether the restraining bar, or a similar restraint, was constitutional and *all of them* found that it was.[9] Thus, even if the officers had carefully

[9] *See Ashby* v. *Dees*, No. CV-94-U-0605-NE (N.D. Ala. Dec. 27, 1994); *Vinson* v. *Thompson*, No. CV-94-A-268-N (M.D. Ala. Dec. 9, 1994); *Hollis* v. *Folsom*, No. CV-94-T-0052-N (M.D. Ala. Nov. 4, 1994); *Williamson* v. *Anderson*, No. CV-92-H-675-N (M.D. Ala. Aug. 19, 1993);

studied all the case law, the reasonable conclusion as of 1995 was that the restraining bar was constitutional, even if *Gates* could be read as having "clearly established" its unconstitutionality in 1974.

It was not until three years after the events at issue here—in 1998—that the Middle District of Alabama held that in some circumstances the restraining bar was unconstitutional. See *Austin* v. *Hopper*, 15 F. Supp. 2d 1210, 1260 (M.D. Ala. 1998). It would not be appropriate to expect lay state officers to anticipate what was not grasped by several contemporary federal courts—and to hold those officers personally liable for this lack of prescience. As this Court has held, it is simply "unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.

Dale v. *Murphy*, No. CV-85-1091-H-S (S.D. Ala. Feb. 4, 1986); *Lane* v. *Findley*, No. CV-93-C-1741-S (N.D. Ala. Aug. 4, 1994); *see also Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala. 1994) (not reaching constitutional question and upholding qualified immunity).

CONCLUSION

For all these reasons and those in respondents' brief, the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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